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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

K N ENERGY, INC.,
Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

ROBERT C. McHUGH, Esq.
K N Energy, Inc.
P.O. Box 15265
Lakewood, Colorado 80215

B. J. BECKER, Esq.
K N Energy, Inc.
P.O. Box 609
Haskup, Nebraska 68901

JOHN P. FURMAN, Esq.
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JOHN T. MILLER, JR., Esq.
1001 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 331-1630

Attorneys for K N Energy, Inc. *Counsel of Record*

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QUESTIONS PRESENTED

This appeal arises from a suit for breach of contract brought in a Colorado District Court by an industrial customer against K N Energy, Inc.[1] (K N), an interstate natural gas pipeline company regulated by the Federal Power Commission and its successor the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act. The service was interruptible under certificates of public convenience and necessity issued by the Commission. The trial court found a breach of contract on summary judgment without considering Commission regulation. Damages may be measured by the cost of the fuel oil used by the customer to replace the natural gas which the pipeline did not supply. Efforts by the pipeline company, with the support of the Commission, to refer to the Commission issues that were within the Commission's exclusive and primary jurisdiction were rejected by the trial court, the court of appeals and

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[1]The name of Kansas-Nebraska Natural Gas Company, Inc., was changed to K N Energy, Inc. in April 1983. In compliance with Rule 28.1, K N states that, through Midlands Transportation Company (a wholly-owned subsidiary), it owns 20 percent of the stock of Energy Transportation Systems, Inc. In addition, through Slurco Corporation (another wholly-owned subsidiary), K N is a partner in the ETSI Pipeline Project, a joint venture.

[2] In addition to K N and the plaintiff, The Great Western Sugar Co., two other parties participated in the proceedings before the Supreme Court of Colorado. The Commission filed a petition for a writ of certiorari but did not participate further when the court declined to review the question of "primary jurisdiction." The Interstate Natural Gas Association ("INGAA") filed a petition to intervene and a memorandum brief in support of the grant of

the Supreme Court of Colorado.[2] This petition presents the following questions:

> Whether the Colorado courts failed to respect the exclusive and continuing jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act over interruption of natural gas transported in interstate commerce and ignored or misinterpreted the related obligations of a regulated interstate natural gas pipeline under its certificates of public convenience and necessity, tariff, and wholesale service agreements. *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

> Whether an award of damages for interruptions in interruptible service would create an undue preference and violate the filed rate doctrine where the consumer is not a customer of the interstate pipeline but is served indirectly through a sale-for-resale customer under a tariff on file with the Federal Energy Regulatory Commission (or its predecessor, the Federal Power Commission). *Arkansas Louisiana Gas Company* v. *Hall*, 453 U.S. 571 (1981).

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a writ of certiorari. INGAA is a nonprofit national trade association whose membership includes virtually all of the major interstate natural gas transmission companies subject to regulation by the Commission.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

K N Energy, Inc. petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Colorado in this case.

OPINIONS BELOW

The unreported opinion of the Supreme Court of Colorado issued January 14, 1985 for which review is sought is set out in Appendix A. That opinion affirmed a decision of the Court of Appeals of Colorado (Appendix B) which is reported at 661 P.2d 684 (Colo. App. 1982). In that decision the Court of Appeals

affirmed in part and reversed in part actions by the Colorado District Court in and for the County of Logan in a proceeding captioned *The Great Western Sugar Company* v. *Northern Natural Gas Co. and Kansas-Nebraska Natural Gas Co., Inc.* (Civil Action No. 13503) (see Appendices F and G).

JURISDICTION

Rehearing of the decision of the Supreme Court of Colorado was denied on February 4, 1985. The jurisdiction of this Court to review the decision rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause

(U.S. Constitution, Article VI, Clause 2)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutes and Regulations Involved

Section 1(b) of the Natural Gas Act provides:[1]

> The provisions of this act shall apply to the transportation of natural gas in interstate com-

[1] 15 U.S.C. § 717(b). For other relevant provisions of the Natural Gas Act see Appendix C and for relevant regulations issued by the

merce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT

This case involves a conflict between (1) Colorado contract law as applied in a suit brought in a Colorado state court against an interstate pipeline for breaches of contracts governing the sale of natural gas under interruptible service contracts and (2) the obligations of that pipeline as a "natural-gas company" regulated under the Natural Gas Act.

The law suit was filed on January 8, 1978 by The Great Western Sugar Company (Great Western) in the District Court in and for the County of Logan, Colorado against Northern Natural Gas Company (Northern) and Kansas-Nebraska Natural Gas Co., Inc. (now K N Energy, Inc.) (K N) for failure, beginning in 1973, to deliver natural gas to four of Great Western's sugar beet factories "at such times as they were obligated to do so" by contract. A second claim for relief alleged that increased interruptions in service had resulted from a change in policy designed

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Commission thereunder see Appendix D. References to "the Commission" should be understood as referring to the Federal Power Commission prior to October 1, 1977 and to the Federal Energy Regulatory Commission thereafter.

to permit K N to enhance or maintain its gas supplies in storage fields for later sale to other customers, that K N had failed to disclose this change in policy, and that this failure to disclose constituted fraud.[2] This change in policy occurred in November 1973 when K N decided that it should interrupt service to interruptible customers whenever conditions on its system required the withdrawal of gas from storage in the winter heating season in order to assure continuing deliveries to residential and commercial (firm service) customers.[3]

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[2] Great Western's original complaint included a third claim for relief alleging that K N had induced Great Western to install gas fired equipment and asked for an order requiring K N to supply gas to the factories for the life of this equipment. This third claim was later withdrawn.

[3] The summary judgment against K N in the Colorado District Court was reviewed by the Colorado Court of Appeals. The Great Western Sugar Company v. Northern Natural Gas Co., *et al.*, 661 P.2d 684 (Colo. App. 1982). In its opinion the Court of Appeals described in these terms the situation which K N faced in 1973, including its increasing dependence on gas in storage to meet the peak period requirements of high-priority customers:

> "Beginning in the late 1960's there was a national gas shortage. KN's gas reserves were being consumed at a rate faster than they were being replaced by new discoveries. In addition to declining gas reserves, gas pressure declined throughout KN's system because of the depletion of old wells and the reduction in pressure rate of flow, or deliverability. KN had begun utilizing underground storage reservoirs in 1964 to store gas at points on the system nearer the markets, where it could be utilized to maintain pressures in the pipeline. It became increasingly necessary to supplement deliverability from producing fields with deliverability from storage to maintain necessary pipeline pressure." 661 P.2d at 688.

K N supplied three of Great Western's plants directly.[4] The transportation of gas by K N to the plants in interstate commerce was governed by certificates of public convenience and necessity issued by the Commission under Section 7 of the Natural Gas Act.[5] The certificated service was conditioned upon K N's compliance with all applicable rules and regulations under the Natural Gas Act. Contracts between K N and Great Western entered into in 1973 contained the following provision on "Regulation":

> This agreement and the respective rights and obligations of the parties hereto are subject to all valid and applicable laws and orders, rules and regulations of duly constituted authorities having jurisdiction or control over the parties, Kansas-Nebraska's facilities and gas supply, or any transaction contemplated hereby.

In addition, the contracts contained a provision on "interruption" by which K N was given the right, "in its absolute discretion and without liability to Buyer for damages or otherwise," to "interrupt in whole or in part delivery of gas to Buyer hereunder as and whenever from time to time K N is required to do so in order to meet the demands of domestic and commercial users or other users having a higher priority of service."

The fourth Great Western plant, located at Goodland, Kansas, was supplied by the Peoples Division

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[4] The plants were located at Scottsbluff, Nebraska and at Ovid and Sterling, Colorado.

[5] Kansas-Nebraska Natural Gas Company, Inc., 12 FPC 505 (1953), 28 FPC 1079 (1962), 32 FPC 723, 856 (1964) and 41 FPC 449 (1969).

of Northern Natural Gas Company ("Northern") with gas purchased by Northern from K N under a Service Agreement in the form prescribed by K N's Gas Tariff on file with the Commission. The service was rendered under certificates of public convenience and necessity issued by the Commission.[6]

K N has four storage fields on its system. Two of the fields (at Adolph, Kansas and Springdale, Nebraska), developed when part of K N's intrastate systems, were certificated by the Commission when interconnected with K N's interstate system.[7] The development and operation of the other two much larger storage fields (Huntsman and Big Springs in Nebraska), were authorized by certificates of public convenience and necessity issued under the Natural Gas Act.[8] In applying for certificates for its largest fields, K N represented that the primary use of these storage fields would be to assure the availability of gas to meet the requirements of firm service residential and commercial customers during periods of peak demands.

An attempt by K N to remove Great Western's suit to the United States District Court for the District of Colorado failed. K N then moved to dismiss the

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[6] Kansas-Nebraska Natural Gas Company, Inc., 44 FPC 218 (1970), 50 FPC 570, 1280, 1779 (1973), 52 FPC 1043 (1974), 54 FPC 1434 (1975), 56 FPC 2003 (1976), and 1 FERC ¶ 61,218 (1977).

[7] Kansas-Nebraska Natural Gas Company, Inc., 41 FPC 449 (1969), 53 FPC 990 (1975).

[8] Kansas-Nebraska Natural Gas Company, Inc., 30 FPC 356 (1963), 34 FPC 70 (1965), 39 FPC 168 (1968), 45 FPC 611 (1971), 55 FPC 1956 (1976).

suit on the grounds that the suit constituted an impermissbile collateral attack on Commission policies, orders, rules and regulations and that plaintiff had not exhausted its administrative remedies (Appendix E). The motion was denied.

Great Western filed a motion for partial summary judgment as to the three directly served plants, contending that no genuine issue of material fact existed as to the interpretation of the contracts between Great Western and K N. The trial court granted Great Western's motion on the ground that K N's contracts with Great Western permitted K N to interrupt service *only* to protect the short-term (24 to 36 hours) needs of its domestic and commercial customers and did not authorize the withholding from interruptible customers of gas in storage.[9] (See Appendix F). The Court denied K N's motion for reconsideration in which it argued that there were issues of material fact which could not be disposed of by summary judgment and that orders issued by the Commission "required Kansas-Nebraska to husband gas in its storage fields

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[9] The contracts contained no such specific terms. Great Western's separate motion for partial summary judgment against K N related to its supply to Northern at Goodland. Although the Court took the position that K N breached its service agreement with Northern for the same reasons it had breached its contracts with Great Western, the motion was denied on the ground that there was a factual issue which a jury should decide: whether K N and Northern intended Great Western to be a third-party beneficiary. See Appendix G. The jury later found that Great Western had this status and was entitled to damages from K N for interruptions by Northern at Great Western's plant at Goodland, Kansas. As to the suit by Great Western against Northern, the jury found for Northern.

for its high priority users and abrogated provisions of its contracts which were inconsistent therewith." K N's motion for referral to the FERC of ten specified issues (see Appendix H) was denied[10] despite arguments by the Solicitor of the Commission in an *amicus* brief, that "[B]efore this Court determines the legal consequences of K N's alleged actions, there should first be a determination by the Commission of the issues listed in K N's motion to refer which are in the Commission's primary or exclusive jurisdiction to resolve."[11] (For the court's order see Appendix I.)

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[10] The ten issues included whether K N's decision in 1973 that it should not provide service to large interruptible boiler fuel customers during periods of withdrawals from storage was in accordance with FPC policies and orders; whether Great Western's interpretation of the interruption provisions of its contracts was inconsistent with the terms of the certificates authorizing service to Great Western and the operation of K N's storage fields; and whether an award of damages to Great Western would constitute an undue preference or advantage in contravention of Section 4(b) of the Natural Gas Act.

[11] The FERC brief made, *inter alia*, the following points:

(1) "The question presented [for referral to the Commission] involves matters of substantial importance to the responsibilities of the Federal Energy Regulatory Commission. The natural gas service agreements which are the subject of this private litigation involve matters within the Commission's jurisdiction over interstate transportation of natural gas. . . . *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972)."

(2) "When a certificate [of public convenience and necessity] is issued by the Commission and accepted by the company, the Commission acquires a continuing jurisdiction over the services rendered thereunder and the operation of the certificated facilities." [Footnote omitted.]

(3) "The FERC does not have jurisdiction to adjudicate common law claims for contract liability [footnote omitted]; this Court does. However, ... the Commission has exclu-

K N then applied to the Colorado Supreme Court for a writ of prohibition, citing the Supremacy Clause of the U.S. Constitution (Appendix J). The petition was denied, without explanation, on June 21, 1979 (Appendix K), and the case proceeded to a jury decision on the issues of fraud, Great Western's third party status, and the amount of damages to be awarded Great Western.

Before the Colorado Court of Appeals, K N renewed its motion for a referral of specified issues to the

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sive jurisdiction over the interpretation and enforcement of matters which are interposed between the parties' contracts and the execution by the pipeline of the terms of those contracts: certificates of public convenience and necessity and curtailment plans. Finally, when the issue is the allocation of reductions in natural gas service, it is particularly important that there be uniformity of regulation, so that the allocation is not unduly discriminatory."

(4) "The issues raised by this suit which are within the FERC's special competence should be referred to the Commission, because Great Western's claims against K-N for breach of contract . . . have ramifications far beyond their seeming simplicity. They represent a private controversy with transcendent public issues." [Footnote omitted.]

(5) "K-N's contracts with Great Western and with Northern are subject to the regulatory authority of the Federal Energy Regulatory Commission. Before this Court determines the legal consequences of K-N's alleged actions, there should first be a determination by the Commission of the issues listed in K-N's motion to refer which are in the Commission's primary or exclusive jurisdiction to resolve. Deferral to the Commission is particularly appropriate in this case, because the issues which this damage action invokes are highly complex and have an impact on the public interest which transcends the private litigation before this Court. There is a substantial possibility, absent reference to the Commission, of a conflict between the decisions of this Court and the Commission. Such conflict could affect the Commission's ability to regulate reductions in natural gas service in a uniform manner."

Commission on the basis that the Commission "has both exclusive and primary jurisdiction" over issues in the proceeding. The Commission filed an *amicus* brief arguing that the referral motion should be granted.

The Colorado Court of Appeals affirmed the summary judgment determination of the trial court but remanded the case for a new trial on the issue of damages to be awarded to Great Western. *The Great Western Sugar Company* v. *Northern Natural Gas Company, et al.*, 661 P.2d 684 (Colo. App. 1982). The Court of Appeals ruled that the trial court, in exercising its discretion, had not erred in refusing to refer particular issues to the FERC. In the opinion of the Court of Appeals, "Common law contract claims are the basis of this litigation, and these claims are within the conventional competence of state courts." (*Ibid.*) The Court did not comment on the jurisdictional claims made by the FERC in its *amicus* brief.[12]

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[12] Following issuance of the opinion of the Court of Appeals, K N filed with the Commission a petition for a declaratory order which described the court proceedings in Colorado and asked the Commission to resolve the following questions: (1) whether, if K N had supplied all of Great Western's interruptible requirements during periods of storage withdrawal, it would have violated its obligations under its certificates, other Commission orders, and its FPC/FERC Gas Tariff; and (2) whether an award of damages to Great Western would constitute an undue preference or advantage under Section 4(b) of the Natural Gas Act (15 U.S.C. § 717c(4)(b)) or a violation of the "filed rate doctrine" (as defined in Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571 (1981). The Commission initiated a formal hearing in Docket No. TC82-43-000. K N Energy, Inc., 21 FERC ¶ 61,285 (1982). Great Western intervened and participated actively in the 47-day hear-

K N's petition for writ of certiorari to the Supreme Court of Colorado (Docket No. 82SC322) was supported by an *amicus* brief of the Commission relating to the matter of its jurisdiction. K N argued that the "FERC has exclusive and primary jurisdiction over issues in this case and a failure to refer issues to the FERC would violate the Supremacy Clause of the United States Constitution by interfering with the authority of the United States pursuant to the Natural Gas Act," and that the courts below had ignored "the limitations imposed upon Kansas-Nebraska by the certificates of public convenience and necessity issued by the FPC which authorized service to Great Western and the operation of Kansas-Nebraska's storage fields, the requirements imposed by rules, regulations, and orders of the Commission, and the terms of Kansas-Nebraska's Gas Tariff on file with the Commission" which includes the terms of service to sales-for-resale customers and provisions on limitations of deliveries applicable to both sales-for-resale customers and direct sale customers.

The Supreme Court of Colorado granted certiorari limited to the following issues:

> Whether the trial court erred in granting Great Western Sugar Company's motion for summary judgment on the issues of liability.

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ing. The Administrative Law Judge issued his decision on February 27, 1985. The matter is pending before the Commission on exceptions filed by K N, Great Western and the Commission Staff. Great Western's challenge of the Commission's decision to hear the matter was dismissed on April 16, 1984 in The Great Western Sugar Company v. Federal Energy Regulatory Commission, D.C. Cir. No. 83-1135.

> Whether the trial court erred in excluding from evidence FERC orders, Kansas-Nebraska's certificates of public convenience and necessity and tariffs, and certain expert witness testimony.

The Court did not grant certiorari on whether the doctrine of "primary jurisdiction" required the referral of issues to the FERC. As a consequence, the Commission did not file an *amicus* brief on the issues before the Court.

The Supreme Court of Colorado affirmed the judgment of the Court of Appeals on January 14, 1985 (Appendix A), limiting its opinion to two subjects: the grant of summary judgment, including the effect of Commission orders, tariffs, and certificates; and certain evidentiary rulings made by the trial court. The Court relegated to a footnote K N's arguments regarding the Commission's exclusive jurisdiction:

> 8. In addition, K N claims that state court jurisdiction to award damages for nondelivery of natural gas is preempted by federal law, that the state court had no jurisdiction to award damages in this case because of the "filed rate doctrine," that even if the state court were to retain jurisdiction it must apply federal common law, and that GW failed to exhaust its administrative remedies. None of these matters are fairly raised by the issues upon which we granted certiorari, and we therefore do not consider them. C.A.R. 53(a)(3); *Vigoda* v. *Denver Urban Renewal Authority*, 646 P.2d 900, 907 (Colo. 1982). We expressly declined to review the intertwined questions of primary jurisdiction, exclusive federal jurisdiction and federal preemption raised in K N's petition for certiorari.

K N's petition for rehearing was denied by the Supreme Court of Colorado on February 4, 1985. Its judgment has therefore become final.[13]

REASONS FOR GRANTING THE PETITION

A. The Colorado courts failed to respect the exclusive and continuing jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act over the interruption of natural gas transported in interstate commerce and ignored or misinterpreted the related obligations of a regulated interstate natural gas pipeline under its certificates of public convenience and necessity, tariff, and wholesale service agreements. As a consequence, K N has been found in breach of contract for failing to provide a service it was not authorized to render.

1. *The jurisdiction of the Commission.*

When Congress enacted the Natural Gas Act in 1938, it gave the Commission jurisdiction over (1) the transportation of natural gas in interstate commerce, (2) the sale in interstate commerce of natural gas for resale, and (3) natural-gas companies engaged in such transportation or sale (15 U.S.C. § 717(b)). *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana,* 332 U.S. 507, 516 (1947). In the context of the gas shortages of the early 1970s, when an interstate pipeline filed with the FPC a proposed plan for the curtailment of deliveries including deliveries to direct-sale customers, the Fifth Circuit held (1) once the Commission has approved the construction and

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[13] The District Court of Logan County has set the week of December 16, 1985 for the new trial on the issue of damages remanded by the judgment of the Court of Appeals.

operation of the facilities required to deliver gas transported in interstate commerce to a direct-sale customer, the Commission's authority over that sale is at an end (in the absence of an attempt by the pipeline to abandon service) and (2) "the FPC has no form of continuing certificate jurisdiction over direct sales to customers of interstate pipeline companies." *Louisiana Power & Light Company* v. *United Gas Pipe Line Company,* 456 F.2d 326, 338 (5th Cir. 1972).

This Court reversed in *Federal Power Commission* v. *Louisiana Power & Light Company,* 406 U.S. 621 (1972), holding that the Commission's transportation jurisdiction includes a continuing authority over deliveries of gas to direct-sale customers (except for the rates charged) and over interruptions in those deliveries. The Court quoted with approval[14] from *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana, supra,* 332 U.S. at 523:

> "[T]he matter of interrupting service is one largely related . . . to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states."[15]

This Court recognized that in exercising its jurisdiction over transportation "the Commission must possess broad powers to devise effective means to meet" its responsibilities. (406 U.S. at 642) It must

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[14] 406 U.S. at 641.

[15] The curtailment of service contemplated by the Court in *Panhandle* occurred "when weather conditions or others require it". (332 U.S. at 523) The Court was not then concerned with a gas supply shortage of the nature experienced in the 1970s.

be free to make the "pragmatic adjustments which may be called for by particular circumstances." *Ibid.*, quoting from *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). It follows that, in lawsuits arising from reductions in deliveries of natural gas to interruptible direct-sale customers, state courts and lower Federal courts have an obligation to respect the jurisdiction, orders and expertise of the Commission and to avoid decisions which nullify valid Commission orders.

In *Louisiana Power & Light* this Court recognized that if the courts[16] and regulatory agencies in each state were free to determine whether, how, and when an interstate pipeline may interrupt service to direct industrial customers it could lead to contradictory results. In such circumstances "the desirability of uniform federal regulation is abundantly clear."[17]

During the period covered by this lawsuit, KN served some 100 direct industrial customers in the States of Kansas, Nebraska, Colorado and Wyoming. The service involved in this appeal was certificated by the Commission as interruptible service, which means that the customer was not entitled to receive gas whenever it wanted it but only when the pipeline offered it. Such interruptible service lacks a volumetric entitlement. The decisions of the Colorado courts effectively converted this interruptible service to firm service, finding a breach of contract because KN changed its

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[16] The Supremacy Clause applies to state court decisions as well as to those of regulatory agencies. Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 766 (1982).

[17] 406 U.S. at 633-4.

forecast base for interruptions and denied an interruptible customer access to storage gas without its consent. K N is exposed to the payment of damages for failure to supply the full natural gas requirements of Great Western.[18] The courts did not base their decision on a violation by K N of the Natural Gas Act, Commission orders or K N's tariff.

The state courts usurped a function which is within the Commission's exclusive jurisdiction, namely, the upgrading of certificated interruptible service.

In such a case of exclusive jurisdiction, the state courts are obliged to refer to the Commission the question of the nature of the interruptible service to which Great Western was entitled in light of the requirements of the Natural Gas Act, and applicable Commission orders, rules and regulations and K N's tariff. This Court stated the governing principle in cases of "exclusive preliminary jurisdiction" in *Far Eastern Conference* v. *United States,* 342 U.S. 570, 574-5 (1952):

> The Court [in *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1972)]. . .

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[18] In the jury trial on damages, K N was afforded an opportunity to demonstrate that it could not supply Great Western. Its proof in that respect was rejected for various reasons sustained by the Supreme Court of Colorado. (Opinion at pp. 29-36) K N's firm residential and commercial market requirements increase significantly as the weather gets colder. The pipeline has to be able at all times in the winter to meet demands which the coldest weather conditions which might be experienced could impose on its pipeline system. As design conditions are in fact seldom experienced, it is difficult to demonstrate, after the fact, that K N did not have to interrupt interruptible customers to protect its firm market.

applies a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.[19]

2. *The mistaken approach of the Colorado Supreme Court.*

The opinion of the Supreme Court of Colorado illustrates what can occur when a state court refuses to avail itself of the specialized competence of an administrative agency and attempts to dispose of issues which ought to have been referred to the agency. In the present case these issues include the interpretation of Commission orders in certificate proceedings authorizing the operation of pipeline transportation facilities, including storage facilities, and policy state-

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[19] For applications of the principle of *Cunard* and *Far Eastern Conference* see Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 654 (1973); Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 305 (1973); International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233, 238 (1971), quoting from Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., Inc., 381 U.S. 676, 684-685 (1965).

ments issued in the 1970s as a result of natural gas supply shortages.

a. *Orders in certificate proceedings.*

Having refused to consider the question of exclusive federal jurisdiction, the Supreme Court of Colorado examined the case from the wrong end. Instead of seeking to determine whether the Commission authorized the service the trial court's judgments implied was Great Western's entitlement, the Court examined those orders to see if they were inconsistent with the construction the trial court placed on the contracts on summary judgment. This is not a mere matter of emphasis. The Court's approach assured that K N's primary obligation to supply firm service, and to develop and operate storage fields to assure a capability to maintain such service, would be passed over, and that the Commission's intention that K N have no obligation to provide interruptible customers with any specific volume of natural gas be ignored.

The Supreme Court of Colorado was advised by K N that when it first asked for permission to serve Great Western's plant at Ovid, Colorado, the Commission directed that the facilities being authorized were not to be operated to render firm service to any interruptible customers without further Commission authorization. The Court usurped the Commission's function by concluding that this certificate condition "is consistent with a contract that *prevents* K N from implementing its storage withdrawal interruption policy . . . ."[20] (Emphasis supplied.)

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[20] Opinion at p. 17.

The Supreme Court also usurped the authority of the Commission in connection with the development and operation of the Big Springs Storage Field in Nebraska.[21] K N's application in that proceeding advised the Commission that Big Springs was needed to "carry out conservation practices, [and] husband gas for high priority firm gas customers . . . ." In issuing the certificate the Commission noted that deliverability studies by K N indicated that its sources of gas supply "will be unable to meet peak requirements during the 1976-77 heating season and consequently, Big Springs peaking capabilities will be required during this period and in subsequent years."[22] The Commission also noted in its certificate order that K N had adopted the policy of not withdrawing gas from underground storage to serve interruptible industrial customers.[23] The Supreme Court of Colorado contradicted these purposes by asserting that the Commission was withholding approval of the storage withdrawal interruption policy for consideration in a new proceeding which it instituted, a proceeding which could not possibly have been concluded in time to affect K N's storage operations in the subsequent 1976-1977 winter season. The Court was in no position to read the Commission's mind on this subject or to defeat its purposes.

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[21] Kansas-Nebraska Natural Gas Company, Inc., 55 FPC 1956 (1976).

[22] 55 FPC at 1956-1957.

[23] See *id.* at 1958.

b. *Policy statements.*

The Colorado Supreme Court disposed of the Commission's policy statements as though they were separate and independent from its certificate orders. This betrays a fundamental misunderstanding of the role of policy statements in advising the regulated pipeline companies as to the conduct the Commission considers to be consistent with their obligations under the Natural Gas Act and certificate orders.[24]

The certificates of public convenience and necessity issued to K N by the Federal Power Commission placed K N under a continuing obligation to operate its facilities in a manner which would assure adequate service to its high-priority firm customers throughout the winter heating seasons. K N's largest storage fields had been authorized primarily to assist K N in protecting such service on a continuing basis.

In policy statements issued in the early 1970s the Commission reminded interstate pipelines that, under their certificates of public convenience and necessity, they had an obligation to provide reliable and adequate service to firm service customers throughout the heating season and that they should operate their storage fields accordingly. Thus in Order No. 431,[25]

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[24] "A general statement of policy, . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed." Pacific Gas and Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). "A general statement of policy, however, may not be irrelevant for all purposes. For example, a policy statement establishing initial guideline prices may have some relevance in determining cost trends." (*Id.* at 38, n. 19)

[25] Policy with respect to establishment of measures to be taken for the protection of as reliable and adequate service as present

the Commission adopted a policy statement which directed that "jurisdictional pipeline companies shall take all steps necessary for the protection of as reliable and adequate service as present supplies and capacities will permit during the 1971-72 heating season and thereafter, including adequate injection into storage in anticipation of the heating season." The Commission further directed that "[d]uring the storage injection season *all* natural gas pipelines subject to the jurisdiction of the Commission should make every reasonable effort to fill all storage fields supplied by such pipelines to a capacity sufficient to meet the anticipated heating season demands." 45 FPC at 571 (emphasis supplied). As the Commission was addressing service requirements which might be encountered within seven months, it obviously did not intend that compliance await either the consent of the pipeline's interruptible customers or Commission approval of a curtailment plan (as the Supreme Court of Colorado supposed).[26]

Commission Order No. 498 requested that pipelines "where possible, husband present supplies of natural gas for high priority usage" and suggested a number of steps which might be taken to conserve natural gas.[27] The Court observed: "None of the suggested

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natural gas supplies and capacities will permit, Docket No. R-418, Order No. 431, 45 FPC 570 (1971). This policy statement was the basis of this Court's decision in FPC v. Louisiana Power & Light Co., *supra*, that pipelines could file curtailment plans with the Commission under Section 4 of the Natural Gas Act.

[26] Opinion at p. 19.

[27] Nation-wide fuel emergency, Docket No. RM74-8, Order No. 498, 50 FPC 1954, 1957-8 (1973).

conservation measures related to curtailment of deliveries."[28] This conclusion is quite obviously at odds with the Commission's purpose as natural gas could not be husbanded in storage for high-priority uses if a pipeline was required either to deliver gas from storage to low-priority, interruptible customers or to pay damages.

The Supreme Court of Colorado asserts that the "storage withdrawal policy has no necessary relationship to . . . the preservation of service to higher priority customers."[29] But that requires an expert understanding of the certificated purpose and nature of K N's storage fields which the Commission and not the state courts possesses. In the circumstances, the court was obliged to refer the issue to the Commission.

c. K N's tariff.

In 1976 K N filed a revised tariff under Section 4 of the Natural Gas Act which made its storage withdrawal interruption plan applicable to its sale-for-resale customers (like Northern) as well as its direct sales customers. The new text provided that "Seller shall not be required to remove gas from storage reservoirs for delivery to consumers served by Seller on an interruptible basis or under interruptible service rate schedules in this Tariff." The tariff change was suspended and became effective on March 14, 1976 while a hearing into its lawfulness was pending.[30]

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[28] Opinion at p. 20.

[29] *Id.* at 11-12.

[30] A modified form of the text became effective July 1, 1977, after suspension, and pending a hearing on its lawfulness, as part of K N's proposal to utilize eight priority-of-service categories.

Great Western participated actively in the subsequent hearings before the Commission. The Commission never rendered a decision on the lawfulness of the proposed tariff changes, approving instead a settlement which provided a similar tariff provision for the future.

The Supreme Court of Colorado ruled that K N's filing was contrary to its contract obligation to give Great Western access to storage and, therefore, constituted a unilateral contract change, a legal nullity under the *Mobile-Sierra* doctrine inasmuch as it was never approved by the Commission.[31] Great Western never raised the *Mobile-Sierra* defense in the FPC proceedings, so that the agency could timely rule on the question whether it had jurisdiction to hear the matter. It failed to exhaust its administrative remedies. The proper procedure was for Great Western to raise the issue before the Commission and, if it lost at that level, to appeal an adverse judgment to an appropriate court of appeals.[32]

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[31] Opinion at pp. 26-27. United Gas Pipeline Co. v. Mobile Gas Service Co., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956). *Cf.* United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958) (approving acceptance by FPC of pipeline rate filing and *reversing* Memphis Light, Gas and Water Division, 250 F.2d 402 (D.C. Cir. 1957)).

[32] For cases illustrating judicial review of Commission decisions under the Natural Gas Act and the Federal Power Act on whether a rate filing constituted a "unilateral" change see Tyler Gas Service Company v. Federal Power Commission, 247 F.2d 590 (D.C. Cir. 1957); Public Service Commission of Indiana v. Federal Energy Regulatory Commission, 575 F.2d 1204, 1209-1211 (7th Cir. 1978); Appalachian Power Company v. Federal Power Commission, 529 F.2d 342 (D.C. Cir. 1976) and cases cited at 344, note 22.

Great Western had the opportunity to challenge the legality of the proposed curtailment plan in K N's tariff filing before the Commission. Again, it failed to exhaust its administrative remedies. Instead of insisting on a definitive decision by the Commission, as it had a right to do after an initial decision was issued by the hearing examiner,[33] Great Western acquiesced in a settlement of the case and a termination of the proceeding.[34]

The decision of the Supreme Court of Colorado, insofar as it relates to K N's tariff, constituted an improper and untimely collateral attack on a Commission order.[35]

3. *The need for guidance from this Court.*

This Court stated in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana, supra,* 332 U.S. at 523, that "the matter of interrupting service is one largely related . . . to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states." K N provided service from its interstate system to some 100 direct interruptible industrial customers in the states of Colo-

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[33] See Minneapolis Gas Co. v. FPC, 294 F.2d 212 (D.C. Cir. 1961).

[34] Kansas-Nebraska Natural Gas Company, Inc., 17 FERC ¶ 61,102, p. 61,208 (1981).

[35] See Montana v. United States, 440 U.S. 147, 152-153 (1979); United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 598 (1948).

rado, Kansas, Nebraska, and Wyoming. One objective of the Natural Gas Act, as the Solicitor of the Commission advised the Colorado courts, is to achieve uniformity of regulation and to avoid the undue discrimination prohibited by Section 4(b) of the Act.[36] This objective cannot be achieved if the courts of one state are free to determine for themselves, without any deference to the views of the Commission, what the service obligations of an interstate pipeline are to local customers.

B. An award of damages for interruptions in interruptible service would create an undue preference and violate the filed rate doctrine where the consumer is not a customer of the interstate pipeline but is served indirectly through a sale-for-resale customer under a tariff on file with the Federal Energy Regulatory Commission (or its predecessor, the Federal Power Commission).

A substantial portion of the damages awarded to Great Western by the Colorado District Court is attributable to interruptions in service by Northern of Great Western's plant at Goodland, Kansas. K N did not serve that plant directly. Service by Northern to the plant was regulated by the Kansas Corporation Commission.

Service by K N to Northern, including service under an interruptible rate schedule, was authorized by the Commission in a certificate of public convenience

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[36] Section 4(b)(2) provides in pertinent part that no natural-gas company shall "maintain any unreasonable difference in . . . service . . . either as between localities or as between classes of service." 15 U.S.C. § 717c(b)(2).

and necessity issued in 1970.[37] The Commission's order conditioned the certificate upon compliance by K N "with all applicable Commission regulations and particularly" certain specified regulations,[38] among them Section 154.21 which provides:

> "The effective tariff of a natural-gas company shall be the tariff filed pursuant to the requirements of this part, and permitted by the Commission to become effective. No natural-gas company shall directly or indirectly, demand, charge or collect any rate or charge for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or impose any classifications, practices, rules or regulations, different from those prescribed in its effective tariff and executed service agreements on file with the Commission, unless otherwise specifically provided by order of the Commission."

Another incorporated regulation is Section 157.20(e) which provides: "The certificate issued to applicant . . . shall be effective only so long as applicant continues the operations authorized by the order issuing such certificate and in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations and orders of the Commission." This incorporates Section 4(b) of the Natural Gas Act which prohibits the grant of undue preferences or advantages.[39] K N could not provide uninterrupted service

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[37] Kansas-Nebraska Natural Gas Company, Inc., 44 FPC 218 (1970).

[38] *Id.* at 220 (Ordering Paragraph (B)).

[39] In the proceedings in the Colorado courts K N repeatedly called attention to these provisions of the Natural Gas Act and the rules and regulations of the Commission.

to Northern (for Great Western's benefit at Goodland, Kansas) while interrupting service to its other wholesale customers purchasing gas under the same interruptible rate schedules.

The Colorado District Court held that Great Western was a "third party beneficiary" of the service agreement between K N and Northern on file with the Commission. To provide Great Western with a damage award based on the K N/Northern service agreement, thereby permitting Great Western to stand in Northern's shoes, has the same consequences as a rebate by K N to Northern. The recovery is not based on a violation of the Natural Gas Act, or on a finding that the interruption was due to K N's negligence, imprudence, improvidence or willful misconduct. It is based on the service agreement. The net effect of the Court's award is to leave K N with a different (lower) rate for its services than is provided for in its tariff. Therefore, the award of damages to Great Western by the Colorado courts violates the "filed rate doctrine" and must be annulled. That doctrine was applied in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), a case in which a producer selling to a pipeline sought to obtain by means of a state court judgment in a breach of contract suit a different (higher) rate than was set out in the producer's sales contract on file as a rate schedule with the FERC. The Court observed that "under the filed rate doctrine, when there is a conflict between the filed rate and the contract the filed rate controls." [40]

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[40] 453 U.S. at 582.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT C. MCHUGH, Esq.
K N Energy, Inc.
P.O. Box 15265
Lakewood, Colorado 80215

B. J. BECKER, Esq.
K N Energy, Inc.
P.O. Box 609
Haskup, Nebraska 68901

JOHN P. FURMAN, Esq.
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JOHN T. MILLER, JR., Esq.
1001 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 331-1630

Attorneys for K N Energy, Inc.

Counsel of Record

May 6, 1985

APPENDIX

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APPENDIX A

SUPREME COURT, STATE OF COLORADO

No. 82SC322

January 14, 1985

KN Energy, Inc.,
a Kansas corporation,

Petitioner,

vs.

The Great Western Sugar Company,
a Delaware corporation,

Respondent,

and

Northern Natural Gas Co.,
a Delaware corporation,

Defendant.

CERTIORARI TO THE COLORADO COURT OF APPEALS

EN BANC JUDGMENT AFFIRMED

Bruce D. Pringle
James A. Clark
Baker & Hostetler
Denver, Colorado

William R. Smith
Hershberger, Patterson, Jones & Roth
Wichita, Kansas
John T. Miller
Washington, D.C.

Attorneys for Petitioner KN Energy, Inc.

Hardin Holmes
Kenneth L. Starr
Jeffrey Reiman
Holmes & Starr, P.C.
Denver, Colorado

Attorneys for Respondent The Great Western Sugar Company

John H. Cheatham, III
Washington, D.C.

Attorney for Amicus Curiae Interstate Natural Gas Association of America

JUSTICE DUBOFSKY delivered the Opinion of the Court.

We granted certiorari to review *Great Western Sugar Company v. Northern Natural Gas Company*, 661 P.2d 684 (Colo. App. 1982),[1] in which the Court of Appeals affirmed a district court order granting partial summary judgment on the liability of KN Energy, Inc. (KN) arising from its natural gas supply contract with Great Western Sugar Company (GW), as well as a subsequent jury verdict awarding damages to GW. The Court of Appeals also affirmed a number of the district court's evidentiary rulings. We limited certiorari review to the following issues: (1) whether the district court erred in granting partial summary judgment on liability; and (2) whether the district court erred in excluding from evidence certain expert testimony, a number of Federal Energy Regulatory Commission (Commission) orders,[2] tariffs filed before the Com-

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[1] For a more detailed statement of the facts underlying the controversy before us, see the Court of Appeals' opinion.

[2] Until October 1, 1977, the Federal Energy Regulatory Commission was known as the Federal Power Commission. We refer to both agencies as "the Commission."

mission by KN, and a number of KN's certificates of public convenience and necessity. We affirm the decision of the Court of Appeals.

KN is a natural gas pipeline company regulated by the Commission under the provisions of the Natural Gas Act. 15 U.S.C. § 717 *et seq.* (1976). Beginning in 1955, KN executed a series of contracts with GW obligating KN to supply the natural gas requirements of GW's sugar processing plants in Ovid and Sterling, Colorado, and Scottsbluff, Nebraska. The initial contract for each site provided that service to GW's boilers and dryers was "interruptible"[3] and that KN

> in its absolute discretion and without liability to Buyer for damages or otherwise shall have the right to and at any time with or without notice may interrupt in whole or in part delivery of natural gas to Buyer as and whenever from time to time Vendor in its sole judgment may deem necessary or expedient for conservation of gas for domestic use or industrial use having prior classification.

This language remained in all KN-GW agreements until March 1973, when KN revised the provision to permit interruptions in order to meet the demands of "users having a higher priority of service."[4]

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[3] Natural gas service is divided into two categories: "interruptible," permitting cessation of delivery under certain conditions, and "firm," providing for an unconditional delivery obligation. Within the "interruptible" category, gas companies may set a priority among the customers to be interrupted.

[4] The change in contractual language reflects KN's adoption of the Commission's suggested "priority of service" categories for curtailment, set forth in Order No. 467 and discussed in Part I.C.2, *infra*. The adoption of these categories did not change GW's priority-of-service ranking under KN's former classification system.

The agreements between KN and GW also contained a "force majeure" clause, which provided that KN would not be liable for any failure of delivery resulting from any of a series of enumerated supervening circumstances, including the "order or requirement of competent authority . . . ." In addition, beginning in March 1973, KN inserted the following clause into the contracts:

> This agreement and the respective rights and obligations of the parties hereto are subject to all valid and applicable laws and orders, rules and regulations of duly constituted authorities having jurisdiction or control over the parties, KN's facilities and gas supply, or any transaction contemplated hereby.

KN also supplied gas indirectly to a GW sugar plant in Goodland, Kansas, through a service agreement with the People's Natural Gas Division of the Northern Natural Gas Company (People's-Northern). People's-Northern in turn transmitted the gas to GW under a sales agreement. The service agreement between KN and People's-Northern provided for delivery of

> all the natural gas required by Buyer from day to day up to the amount of the Billing Demand plus . . . the Winter Period Demand on a firm basis but in no case is Seller to be required to furnish on any day a volume larger than the then existing Billing Demand plus . . . the Winter Period Demand. . . . Seller also agrees to make deliveries of gas to Buyer in daily volumes in excess of the Billing Demand plus . . . the Winter Period Demand on an interruptible basis when gas and facilities are available for making such deliveries.

Billing Demand plus Winter Period Demand comprised the gas supplied on a firm basis. People's-Northern sold only interruptible gas to GW for its Goodland boilers and dryers. The agreement contained clauses concerning force

majeure and the effect of administrative regulations similar to the clauses contained in the service agreements between KN and GW.

From 1955 until November 1973, KN determined when to interrupt both its direct and indirect gas service to GW by utilizing what the parties refer to as the "historical twenty-four to thirty-six hour analysis." Under this analysis, KN's gas dispatchers estimated anticipated demand for the coming twenty-four to thirty-six hours on the basis of weather forecasts. If, due to the estimated demand, KN would be unable to maintain sufficient pressure in its pipelines to serve its firm customers, KN would cut off gas supply to its interruptible customers, including GW. In estimating its ability to maintain pipeline pressure, KN did not distinguish among its available sources of gas; pressure was maintained by withdrawing gas from both production and storage fields.

On November 7, 1973, KN instituted a new policy for determining when to sever service to interruptible customers. Under this policy, known as the "storage withdrawal interruption policy," gas deliveries to interruptible customers were to be cut off whenever KN withdrew gas from storage, regardless of KN's ability to maintain pipeline pressure by using gas from storage.[5]

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[5] Before November 7, 1973, when pressure in a line declined due to demand, KN added delivery from storage to delivery from production fields to increase pipeline pressure. If the demand for gas appeared to be greater than the supply even with the added source, under the twenty-four to thirty-six hour policy KN cut off interruptible customers to keep up pipeline pressure. However, after November 7, 1973, under the storage withdrawal interruption policy, KN cut off interruptible customers whenever it added gas withdrawn from storage to its regular production field withdrawal. The effect of the new policy was to make storage field supplies available only to firm customers, who paid rates higher than the rates paid by the interruptible customers for gas.

On November 8, 1973, KN representatives met with GW representatives at the GW offices in Denver. At that meeting, KN proposed that the gas sales contract then in effect be terminated and replaced with a new contract in order to incorporate certain changes in the rate schedule; the KN representatives reassured GW that, other than the rate changes, the proposed new contract would be "identical" to the previous agreement. The KN representatives testified that they notified GW at that time of KN's new policy regarding interruption of service.[6] One of the GW representatives present at the meeting denied being informed of the change in policy. After the meeting GW executed the new contract to be effective on November 14, 1973. With the exception of the rate changes, the contract adopted was identical to the March 1973 contract.

Early in 1978, GW instituted an action for damages against People's-Northern and KN, alleging that the defendants had breached their contractual gas delivery obligations by instituting the storage withdrawal interruption policy,[7] and that the defendants had fraudulently failed to disclose this change in policy. The defendants moved to refer GW's claims to the Commission, asserting that the Commission had primary jurisdiction over such claims. The district court denied the motion.

In November 1978, GW moved for partial summary judgment against KN on the ground that, as a matter of law, KN had breached its contractual obligations for delivery of gas to the Ovid, Sterling and Scottsbluff plants

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[6] It is unclear which of the two KN representatives present at the meeting actually informed GW of the new policy at the meeting because each testified that it was the other who did so.

[7] Whenever natural gas service was interrupted, GW used more expensive fuel in its boilers and dryers. GW alleged that the fuel oil used during the time at issue in its lawsuit, from November 1, 1973 to March 1, 1979, cost $3.7 million more than natural gas.

by unilaterally changing the standard under which it determined when to interrupt delivery. KN filed a cross-motion for summary judgment, contending that the contract unambiguously permitted KN to exercise its discretion in determining what circumstances required interruption of service; that certain Commission orders, as well as KN's tariffs and certificates of public convenience and necessity on file with the Commission, required KN's change in interruption policy; and that because the policy change was lawful, there was no basis for a claim of fraud. The district court granted GW's motion and denied KN's motion, ruling that the plain language of the contract required KN to adhere to its earlier twenty-four to thirty-six hour historical analysis and that the contract did not allow KN to withhold storage gas from GW. The court also determined that the contract language was consistent with the parties' course of dealing from 1964 until November 1973.

GW filed a second motion for partial summary judgment against KN, arguing that KN's storage withdrawal interruption policy was also in breach of its service agreement with People's-Northern and that KN was liable to GW for the breach because GW was a third party beneficiary of the agreement. The district court ruled that, as a matter of law, the service agreement obligated KN to deliver interruptible gas to Northern as long as it was physically able to do so, that the 1973 policy change regarding interruption resulted in a breach of the agreement, and that GW was a direct beneficiary of the service agreement. However, the court denied the motion for summary judgment, ruling that the factual question of whether KN and People's-Northern intended to confer benefits upon GW or a class of customers that included GW was for the jury to decide.

At trial, the court directed a verdict in favor of People's-Northern on the fraud claim at the close of the plaintiff's

case-in-chief. Following the presentation of evidence, the jury found that KN was not liable on the fraud claim and that People's-Northern was not liable on the contract claim. The jury awarded GW $775,000 in damages arising from the breach of KN's direct gas sales contracts with GW. The jury also found that GW was an intended beneficiary of the service agreement between KN and People's-Northern, and awarded GW $225,000 in damages arising from breach of the agreement. Following the jury verdicts, the court awarded pre-judgment interest and costs to GW, and entered a judgment against KN in the amount of $1,350,229.

The Court of Appeals affirmed the district court's partial summary judgment ruling on the issue of contract liability under the direct contracts, its finding that KN had breached the People's-Northern service agreement, and a number of trial rulings excluding certain evidence. KN now argues that the district court erred in granting summary judgment and finding a breach of the service agreement because (1) an issue of material fact remained as to the parties' intent in entering the November 14, 1973 and subsequent agreements, (2) the district court improperly applied the law governing course of dealing and course of performance, and (3) certain Commission orders, tariffs and certificates of public convenience and necessity required KN's change in interruption policy and immunized KN from contract liability. KN also maintains that the district court erred in excluding from evidence at trial many of the same Commission documents as well as a portion of the expert testimony offered by KN. These contentions are without merit, and we affirm the decision of the Court of Appeals.[8]

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[8] In addition, KN claims that state court jurisdiction to award damages for nondelivery of natural gas is preempted by federal law, that the state court had no jurisdiction to award damages in this case because of the "filed rate doctrine," that even if the state court were to retain jurisdiction it must apply federal com-

I. SUMMARY JUDGMENT

A. Disputed Issues of Material Fact

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). Because summary judgment is a "drastic remedy," the absence of dispute as to all issues of material fact must be clearly shown, and all doubts as to the presence of disputed facts must be resolved against the moving party. *Ginter v. Palmer & Co.*, 196 Colo. 203, 205-06, 585 P.2d 583, 584 (1978); *Abrahamsen v. Mountain States Telephone and Telegraph*, 177 Colo. 422, 426, 494 P.2d 1287, 1289 (1972). Under these principles, KN contends that the entry of summary judgment in favor of GW on the issue of direct contract liability and the finding of breach under the service agreement were incorrect inasmuch as there existed a disputed issue of material fact: whether KN had notified GW of the change in interruption policy prior to the parties' execution of the November 14, 1973 sales agreement. KN argues that the disputed fact is material to a determination of the parties' intent regarding KN's obligations under the November 14, 1973 agreement and subsequent agreements.

The record leaves no doubt that the issue of oral notice is disputed. However, the intent of the parties to a written

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mon law, and that GW failed to exhaust its administrative remedies. None of these matters are fairly raised by the issues upon which which we granted certiorari, and we therefore do not consider them. C.A.R. 53(a)(3); *Vigoda v. Denver Urban Renewal Authority*, 646 P.2d 900, 907 (Colo. 1982). We expressly declined to review the intertwined questions of primary jurisdiction, exclusive federal jurisdiction and federal preemption raised in KN's petition for certiorari.

instrument must be determined primarily from the written terms. *Union Rural Electric Ass'n v. Public Utilities Commission,* 661 P.2d 247, 251 (Colo. 1983); *Radiology Professional Corp. v. Trinidad Area Health Ass'n,* 195 Colo. 253, 256, 577 P.2d 748, 750 (1978). "It is only where the terms of an agreement are ambiguous or are used in some special or technical sense not apparent from the contractual document itself that the court may look beyond the four corners of the agreement in order to determine the meaning intended by the parties." *Pepcol Manufacturing Co. v. Denver Union Corp.,* 687 P.2d 1310, 1314 (Colo. 1984); *see also Union Rural Electric Ass'n,* 661 P.2d at 251; *Radiology Professional Corp.,* 195 Colo. at 256, 577 P.2d at 750. Whether an ambiguity exists, as a matter of law, is for the court to determine. *Pepcol,* 687 P.2d at 1314; *Radiology Professional Corp.,* 195 Colo. at 256, 577 P.2d at 750. In making this determination, the court may consider extrinsic evidence bearing upon the meaning of the written terms, such as evidence of local usage and of the circumstances surrounding the making of the contract. *Pepcol,* 687 P.2d at 1314 n.3; 4 S. Williston, *A Treatise on the Law of Contracts* §§ 601, 609 and 629 (W. Jaeger ed. 1961) (hereinafter "Williston"). However, the court may not consider the parties' own extrinsic expressions of intent. Williston § 611 at 554-55. In ascertaining the intent of the parties here, therefore, we cannot consider extrinsic evidence unless the contract is ambiguous; neither may we consider the oral notice which was KN's expression of intent in our initial determination of whether an ambiguity exists.[9]

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[9] We do not imply that we necessarily would consider KN's oral notice in interpreting the contract were we to find the contract ambiguous. Although extrinsic evidence is admissible to explain the meaning of an ambiguous agreement, extrinsic evidence may not be used to demonstrate an intent that contradicts or adds to the intent expressed in the writing. *Hayutin v. Colorado State*

In our view, as in the opinions of the Court of Appeals and the district court, the written contractual provisions governing KN's delivery obligations are not ambiguous. The clause concerning interruption of service provides that KN had "absolute discretion" to determine when service shall be interrupted; however, the same clause then states that delivery may be cut off only when "KN is required to do so in order to meet the demands" of its higher priority customers. In interpreting the clause, we must attempt "to harmonize and to give effect to all provisions so that none will be rendered meaningless." *Pepcol*, 687 P.2d at 1313; *Union Rural Electric Ass'n*, 661 P.2d at 251. Reading the clause as a whole, it is apparent that KN's discretion in determining when to sever service was limited to the situations in which continuation of service to interruptible customers such as GW could imperil KN's ability to serve its higher priority customers. KN thus was required to predicate interruption upon an analysis—such as the historical twenty-four to thirty-six hour analysis—designed to determined when its ability to serve higher priority customers would be imperiled.

The provision governing gas delivery under the service agreement between KN and People's-Northern bears a similar meaning. KN argues that because its delivery obligations were limited to "the amount of the Billing Demand plus . . . the Winter Period Demand on a firm basis . . . ," it had unbridled discretion in determining when to sever all service beyond that firm commitment, i.e., all interruptible gas. The same provision, however, also committed KN to delivering interruptible gas whenever "gas and facilities are available for making such deliveries." The clause when read as a whole contemplated a severance o-

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Dept. of Highways, 175 Colo. 83, 86-87, 485 P.2d 896, 898, *cert. denied* 404 U.S. 991 (1971); *Regan v. Customcraft Homes, Inc.*, 170 Colo. 562, 565, 463 P.2d 463, 464 (1970); 4 S. Williston, *A Treatise on the Law of Contracts* § 629 (W. Jeager 2d ed. 1961).

interruptible service only when physical limitations prevented continuation of service.

The contracts cannot be read to limit KN's sources of supply for interruptible customers to production fields, as KN did under its storage withdrawal interruption policy, which cut off the interruptible customers as soon as storage field gas was needed to maintain pressure in lines normally supplied only with gas from production fields. The storage withdrawal policy has no necessary relationship to the only express condition limiting service to GW: the preservation of service to higher priority customers. We cannot presume that the parties intended to add such an important condition by implication or by silence. *See* 3 *Corbin on Contracts* § 592 at 554-55 (1960).

In *Kansas Nebraska Natural Gas Co. v. Consumers Public Power District,* 179 Neb. 687, 140 N.W.2d 10 (1966), a gas sales contract called for interruptible service up to "the amount of gas [seller] has available after meeting peak load or other priority demands of its customers. . . ." The seller attempted to limit delivery under the contract to gas obtained from sources of supply already in existence at the time the contract was executed. The court held that the limitation could not be reconciled with the express condition on service contained in the contract; to the contrary, the court found that new sources of supply were included in the language requiring delivery of all gas available after higher priority demands had been met. Similarly, in the instant case, the contract included delivery from all sources until delivery to interruptible customers imperiled service to higher priority customers.

Because the contractual provisions governing KN's delivery obligations are not ambiguous, KN's oral expressions of intent (the alleged oral notification of KN's new interruption of service policy) are not material to the determination of the issue of contractual liability on summary judgment. *See Consumers Public Power District,* 140

N.W.2d at 14 (parol evidence may not be received where provisions governing interruptible gas service are unambiguous). Thus, the district court correctly concluded that all interruptions predicated upon withdrawal from storage, rather than upon an inability to serve higher priority customers, were in breach of contract. The district court's entry of summary judgment on the issue of direct contractual liability and its finding of breach under the service agreement were proper.

B. Course of Dealing and Course of Performance

In granting summary judgment, the district court also found that the parties' course of dealing from 1955 to 1973 was consistent with and buttressed the express terms of the agreement because under the historical twenty-four to thirty-six hour analysis KN interrupted service only when delivery to higher priority customers was imperiled. KN asserts that the parties' course of conduct prior to 1973 is irrelevant to the interpretation of the 1973 contracts. By 1973, KN contends, conditions in the natural gas industry had changed radically; a national gas shortage had arisen, and the Commission had issued a number of orders requesting that pipeline companies conserve natural gas. Only the parties' course of performance under the 1973 contracts, KN maintains, is a true indication of their intent under such changed conditions. KN concludes that the district court should have interpreted the contract terms in light of KN's implementation of, and GW's acquiescence in, the new storage withdrawal interruption policy after 1973.

Under the provisions of the Uniform Commercial Code as adopted in Colorado,[10] the parties' course of dealing

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[10] A contract for the delivery of natural gas is a sale of goods within the meaning of Article 2 of the U.C.C., § 4-2-101 *et seq.*, 2 C.R.S. (1973). *See Oskey Gasoline and Oil Co. v. OKC Refining*, 364 F. Supp. 1137, 1141 n.2 (D. Minn. 1973).

prior to execution of the contract always may be considered in interpreting the express terms of the contract in order that the true understanding of the parties to the agreement may be determined, whether or not the express terms of the agreement are found to be ambiguous. § 4-2-202(a), official comment 1(c), 2 C.R.S. (1973); *Amerine National Corp. v. Denver Feed Co.*, 493 F.2d 1275, 1278 (10th Cir. 1974). Prior dealings are relevant and are generally the "best possible guide" to the parties' true intent. *Nahring v. City and County of Denver*, 174 Colo. 548, 552, 484 P.2d 1235, 1238 (1971) (quoting *Thompson v. Sweet*, 91 Colo. 552, 17 P.2d 308 (1932)). Therefore, the intent evidenced by such conduct is presumed to have been incorporated into the written contract unless the intent evidenced by the conduct has been "carefully negated" by the written terms. § 4-2-202, official comment 2. In the present case, the district court was justified in considering the intent manifested by the parties' eighteen year course of dealing under the twenty-four to thirty-six hour historical analysis.

The parties' course of performance following execution of the contract is also relevant to the interpretation of the agreement. § 4-2-202(a). Course of performance may be used as an aid to interpretation whenever one party accepts repeated performance by the other party with knowledge of the nature of that performance and an opportunity to object to it. § 4-2-208, 2 C.R.S. (1973). Even assuming that these conditions were met here,[11] and that the parties' post-1973 course of performance could be considered, the district court's interpretation of the agreements at issue remains proper. Although a court must strive to harmonize the express terms of an agreement with the subsequent course of performance under that agreement, the express

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[11] As noted above, GW denies knowledge of KN's institution of its new interruption policy.

terms control where harmony cannot be found. § 4-2-208 (2); *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 136 (5th Cir.), *cert. denied* 444 U.S. 938 (1979). The court's goal is to give effect to the parties' intention as of the time the contract was made, Williston § 607 at 379; therefore, a course of performance may explain but not contradict the express terms of the writing. The parties' post-1973 course of performance cannot alter the intent expressed in the contract here.

Here, moreover, KN drafted the 1973 contract without materially changing the provisions governing interruption of service, despite the fact that KN was aware at the time both of the meaning with which the contractual provisions had been invested by an eighteen year course of dealing, and of the changed circumstances that purportedly necessitated abandonment of that course of dealing. KN's failure to alter the contract language in 1973 renders doubtful its assertion that it intended to change the meaning of the contractual language. *See Oskey Gasoline and Oil Co. v. OKC Refining*, 364 F. Supp. 1137, 1142 (D. Minn. 1973) (where party that wishes to change course of dealing drafts a new written contract, it must demonstrate intent to do so by changing contractual language). Under these circumstances, KN's post-1973 course of performance is a unilateral breach of contractual terms rather than an expression of the parties' mutual intent at the time the contract was made.

We hold that the district court properly enforced the express terms of the contract in light of the parties' course of dealing and course of performance.

C. The Effect of Commission Orders, Tariffs and Certificates

KN next argues that certain Commission orders, as well as certain of KN's tariffs and certificates of public convenience and necessity on file with the Commission, modified the contractual provisions concerning interruption of

service, both by operation of law and by operation of the contractual provision incorporating administrative orders and regulations into the contracts. We examine the effect of certificates, orders and tariffs separately.

1. Certificates of Public Convenience and Necessity

Under section 7 of the Natural Gas Act, no pipeline company may transport natural gas or construct natural gas facilities unless the Commission first issues a certificate of public convenience and necessity. 15 U.S.C. § 717f(c) (1984 Supp.). Commission regulations provide that, once such a certificate has been issued, it remains effective "only so long as the applicant continues the operations authorized by the order issuing such certificate. . . ." 18 C.F.R. 157.20(e) (1984). KN argues that the conditions attached to its certificates in the issuing orders required the adoption of the storage withdrawal interruption policy, and that the conditions superseded its contractual obligations both by operation of law and by the contractual language incorporating into the agreement all applicable "orders, rules and regulations" of authorities having jurisdiction over KN's operations. We need not decide whether certificate conditions supersede the contractual obligations in this case, because we determine that none of the certificate conditions to which KN points are inconsistent with KN's contractual delivery obligations.

KN first notes that the order permitting it to establish pipeline service to GW's plant at Ovid forbids KN from inaugurating firm service to any customer then served on an interruptible basis. 12 F.P.C. 505, 510 (1953). The condition in the order is consistent with a contract that prevents KN from implementing its storage withdrawal interruption policy; the dispute in this case focuses not on whether the contract permits interruptible service, but rather on the manner in which interruptions are to be implemented.

KN also relies on the certificate conditions for its service to Northern at Goodland, Kansas. The order granting the certificate incorporated by reference the conditions contained in KN's application for the certificate. 44 F.P.C. 218, 220 (1970). The application incorporated a rate schedule for interruptible gas, which provided that "service rendered under this rate schedule shall be subject to curtailment or interruption upon notice given by Seller to Buyer at least four hours in advance of its effective hour. . . ." Like the condition attached to the Ovid certificate, this condition specifies only that service may be interruptible; it does not address the manner in which interruptions are to be determined.

Finally, KN relies heavily on the order granting the certificate for its Big Springs storage field. KN directs our attention to the Commission's recognition in the order that "KN does not withdraw gas from underground storage to serve interruptible industrial customers." 55 F.P.C. 1956, 1958 (1976). This statement, however, merely recognized KN's unilaterally-imposed policy and was not made a condition to the issuance of the Big Springs certificate. Rather, the Commission made the statement while considering a petition to intervene filed by one of KN's customers, who contended that the establishment of a new storage field was incompatible with KN's previously filed application for permission to abandon service to that customer. The Commission severed the issue from the certificate proceeding and redocketed it for consideration in subsequent abandonment and curtailment hearings. The Commission consolidated in the same hearings its consideration of the lawfulness of KN's newly-filed curtailment plan. 55 F.P.C. at 1959. The curtailment plan included KN's storage withdrawal interruption policy. (*See* discussion of Docket No. RP76-90 in Part I.C.3, *infra*). Because the Commission explicitly postponed consideration of the lawfulness of KN's storage policy, its recognition of the policy earlier in the same order cannot be construed as approval of the policy.

2. Commission Orders

The Commission has jurisdiction to regulate "the transportation of natural gas in interstate commerce. . . ." 15 U.S.C. § 717(b) (1976). Its grant of jurisdiction empowers the Commission to issue orders requiring pipelines to design plans for the curtailment of natural gas delivery during times of shortage. *FPC v. Louisana Power and Light Co.*, 406 U.S. 621 (1972). The Commission has exercised this power on a number of occasions.

Responding to a growing shortage of natural gas in the early 1970's, the Commission issued Order No. 431, designated a "statement of general policy." 45 F.P.C. 570 (1971). The order stated that pipeline companies "should make every reasonable effort to fill all storage fields . . . to a capacity sufficient to meet the anticipated heating season demands." 45 F.P.C. at 571. The order further required that, where curtailment of deliveries would be necessary in order to carry out this policy, the pipeline affected should file a tariff sheet setting forth a curtailment plan. 45 F.P.C. at 572. The order concluded, "Such tariffs, *if approved by the Commission,* will control in all respects notwithstanding inconsistent provisions in sales contracts. . . ." *Id.* (emphasis added).

Two years later, the Commission responded to the continuing natural gas shortage with Orders Nos. 467, 49 F.P.C. 85 (1973), and 467-B, 49 F.P.C. 583 (1973), which suggested an order of priority for the curtailment of natural gas during periods of shortage. These orders too were designated as policy statements and were "not intended to initiate a proceeding or to provide a binding rule without further proceedings directed towards curtailment problems on specific pipelines." 49 F.P.C. at 583. In subsequent curtailment proceedings, the Commission noted, individual curtailment plans would be judged according to the specific circumstances of the pipeline involved. 49 F.P.C. at 584-85.

Later in 1973, the Commission issued Order No. 498, which requested that pipelines "husband present supplies of natural gas for high priority usage," and suggested a number of steps that might be taken to conserve supplies of natural gas. 50 F.P.C. 1954, 1957 (1973). None of the suggested conservation measures related to curtailment of deliveries. *Id.*

KN contends that this series of orders required implementation of its storage withdrawal interruption policy and superseded any contractual obligations to the contrary. KN notes that every order issuing a certificate of public convenience and necessity, as well as a Commission regulation, 18 C.F.R. § 157.20(e), condition the continued validity of KN's certificates upon compliance with all applicable Commission orders, rules and regulations. KN also argues that this series of orders was incorporated into the contract by reference. We disagree.

Although Order No. 431 permits curtailment plans aimed at preserving supplies of natural gas in storage to supersede contractual provisions to the contrary, the order provides that such plans may supersede contractual provisions only "if approved by the Commission. . . ." Approval may be granted only through proceedings under sections 4 or 5 of the Natural Gas Act, 15 U.S.C. §§ 717(c) and 717(d) (1976), to determine whether the plans are just, reasonable, and nondiscriminatory. *Louisiana Power and Light*, 406 U.S. at 642-47; *Hercules, Inc. v. FPC*, 552 F.2d 74, 76-77 (3d Cir. 1974); *State of Louisiana v. FPC*, 503 F.2d 844, 867 (5th Cir. 1974); *American Smelting and Refining Co. v. FPC*, 494 F.2d 925, 934-35 (D.C. Cir.), *cert. denied* 419 U.S. 882 (1974). Thus, the order has no binding effect by itself and is a policy statement that does not mandate or approve KN's storage withdrawal interruption policy or any other particular curtailment plan. *Hercules*, 552 F.2d at 77.

Orders Nos. 467 and 467(b) similarly are policy statements rather than mandatory orders. *General Motors Corp.*

v. FERC, 613 F.2d 939, 945 (D.C. Cir. 1979); *Hercules*, 552 F.2d at 77; *Pacific Lighting Service Co. v. FPC*, 518 F.2d 718, 719 (9th Cir.), *cert. denied* 423 U.S. 1000 (1975); *Pacific Gas and Electric Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974). Like Order No. 431, these orders envision further proceedings for the approval or rejection of individual curtailment plans. Thus, "[a]ny abrogation of contractual commitments will occur only after individual curtailment plans have been filed and approved by the Commission." *Pacific Gas and Electric Co.*, 506 F.2d at 42.

Order No. 498 is a nonmandatory policy statement as well. It "requests" that gas be husbanded in storage for high priority use, but it does not specify particular curtailment measures. Like the other orders, Order No. 498 has no effect by itself on KN's contractual delivery commitment. Under all of the orders cited by KN, its contract obligations can be altered, if at all, only after individual curtailment plans have been approved. We therefore turn next to the curtailment plans filed by KN.

3. KN's Tariffs

Pipeline companies subject to Commission jurisdiction are required to submit to the Commission a tariff sheet showing rates charged for the transportation or sale of natural gas, along with the classifications, practices, and regulations affecting such rates and charges. . . ." 15 U.S.C. § 717c(c) (1976). The tariff becomes effective automatically thirty days after filing. 15 U.S.C. § 717c(d). However, the Commission, upon complaint or upon its own motion, may suspend the operation of the tariff for five months while it conducts a hearing to determine whether the provisions of the tariff are just, reasonable and nondiscriminatory. 15 U.S.C. § 717c(d). At the close of the five month period, the tariff becomes effective whether or not the Commission has made its determination. *Id.* Once a tariff has become effective, the Commission may find it unlawful retroactive-

ly. *Id.* In addition, at any time after a tariff becomes effective, the Commission may initiate proceedings to determine its lawfulness. 15 U.S.C. § 717d (1976).

On August 29, 1975, KN filed a tariff sheet that contained a curtailment plan incorporating the clause: "Seller shall not be required to remove gas from storage reservoirs for delivery to consumers served by Seller on an interruptible basis or under interruptible service rates schedules in this Tariff." The tariff filing was suspended for the statutory period of five months and became effective on March 14, 1976, while a hearing into its lawfulness was pending in Docket No. RP76-90. On June 25, 1976, GW was permitted to intervene. On December 27, 1976, KN filed a revised tariff in RP76-90 setting forth eight priority-of-service categories. The revised tariff retained the provision governing removal of gas from storage, but substituted the phrase "consumers in step one through step five" for the phrase "consumers served by seller on an interruptible basis." All of GW's interruptible fuel service fell within steps one through five. After a first round of hearings, the revised tariff was permitted to become effective pending a final determination of its lawfulness.

In an initial decision in the second round of hearings on the tariff's lawfulness, a Commission Administrative Law Judge (ALJ) held that the tariff provision permitting interruption of service in order to preserve storage violated section 4 of the Natural Gas Act because the curtailment of service to existing customers in order to permit increased service to new or existing customers was unjust, unreasonable, and unduly discriminatory. 6 F.E.R.C. ¶ 63,055 (1979). The ALJ also held that such interruptions constituted an abandonment, in circumvention of the requirements of section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b). On November 2, 1981, the Commission approved a settlement terminating the proceeding in Docket No. RP76-90.

17 F.E.R.C. ¶ 61,102 (1981). The agreement included the following provision:

> Seller shall not be required to remove gas from gas storage reservoirs for delivery to consumers in priority five served by Seller or Buyer, but may utilize gas in storage to make such deliveries when, by reason of storage inventories and prospective withdrawals the withdrawals of gas from storage will not, in the sole judgment of Seller, impair its ability to supply the requirements of consumers, classified in priority one, priority two, priority three, and priority four, during the succeeding twelve month period.

Under the agreement priority five included the same categories of customers included in the earlier steps one through five of the 1975 tariff. The Commission found the settlement provision to be just and reasonable under section 4 of the Natural Gas Act, but refrained from passing on the lawfulness of the provisions contained in the earlier 1975 and 1976 tariffs.

The effect of the tariff filings on the contractual provisions at issue is governed by the United States Supreme Court decisions in *United Gas Pipeline Co. v. Mobile Gas Service Co.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). In *Mobile*, a pipeline company filed a tariff containing a rate schedule different than the rate schedule contained in its existing service contract. The Commission permitted the tariff to become effective after thirty days under section 4(d) of the Natural Gas Act. 15 U.S.C. § 717c(d). The Court held that the filing did not permit the pipeline company to abrogate its contractual obligations. According to the Court, "the Act expressly recognizes that rates to particular customers may be set by individual contracts." 350 U.S. at 338. Section 4(d) does not sanction unilateral changes in contracts; rather, it merely provides that the Commission be notified

of contractual changes through tariff filings in order to facilitate subsequent Commission supervision of these contracts. *Id.* at 339. A tariff filing, the Court found, is the unilateral act of the natural gas company and does not become the order or act of the Commission, even though it becomes automatically effective. *Id.* at 342. Such unilateral action, the Court concluded, is legally ineffective:

> Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity, and we find no basis in the language of section 4(d) for inferring that the mere imposition of a filing-and-notice requirement was intended to make effective action which would otherwise be of no effect at all.

Id. at 339.

In *Sierra*, the Court reached the same conclusion concerning "substantially identical" provisions of the Federal Power Act. 350 U.S. at 350-52. The Court further held that the unilateral rate changes did not supersede inconsistent contractual terms even though the Commission specifically found the tariff lawful after hearings. *Id.* at 352-53. Rates that abrogate existing contracts may only be found lawful, the Court held, if the Commission first finds that the existing contractual rate is unjust, unreasonable, discriminatory or preferential. *Id.* at 353-55.

We believe that the *Mobile-Sierra* rule applies to tariff provisions, other than rate schedules, that have not received Commission approval. Like rate schedules, curtailment plans contained in tariff filings are not lawful merely because they become effective after passage of the statutory period; the legality of the plans remains an open question until the Commission conducts hearings and issues a determination under either section 4 or section 5 of the Natural Gas Act. *Hercules*, 552 F.2d at 87. At least initially, the plans are unilateral actions on the part of the natural gas

company and a legal nullity. *Mobile,* 350 U.S. at 339. Moreover, the Court in *Mobile* found that its conclusion was justified by the Natural Gas Act's purpose of "preserving the integrity of contracts. . . ." 350 U.S. at 344. "The basic thrust of *Mobile* is that the NGA did not displace but only superimposed federal regulation on private contractual arrangements." *Pennzoil Co. v. FERC,* 645 F.2d 360, 373 (5th Cir. 1981), *cert. denied* 454 U.S. 1142 (1982). The stability and integrity of contractual terms governing delivery conditions are as worthy of protection as contractual rate schedules under the *Mobile-Sierra* rule. Therefore, a natural gas company may not unilaterally change the contractual provisions governing interruptible delivery merely by filing a tariff.[12]

In the present case, the 1975 and 1976 storage withdrawal provisions were never judged lawful by the Commission. While the Commission found the interruption provision contained in the 1981 settlement agreement to be just and reasonable, it explicitly refrained from a similar finding regarding the earlier tariffs under which KN was operating throughout the period for which GW sought damages. The tariff provisions remained the unilateral action of KN. Although the contract explicitly incorporated the "orders, rules and regulations of duly constituted authorities having jurisdiction or control over the parties . . . ," under the reasoning of *Mobile,* the tariff filing never became an "order" of the Commission, *Louisiana Power and Light*

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[12] The effect of Commission approval of a tariff filing containing a curtailment plan on an existing contract is not before us. We note that it is an open question whether the Commission may approve a curtailment plan that abrogates contractual delivery commitments without first finding, as required by *Sierra,* that the contractual terms adversely affect the public interest. One court has indicated in *dicta* that the *Sierra* requirement must be met. *International Paper Co. v. FPC,* 476 F.2d 121, 127-28 (5th Cir. 1973).

Co. v. FERC, 587 F.2d 671, 676 (5th Cir. 1979), and the tariff did not affect the contract.[13]

Moreover, quite apart from its legal status, the tariff filing had no effect on the contractual terms because the filing was not inconsistent with the terms of the contract. The filing merely stated that KN was not required to withdraw gas from storage in order to serve its interruptible or lower priority customers. The tariff, however, did not forbid KN from withdrawing storage gas for use by interruptible customers. Under the tariff, KN retained the freedom to make any agreement it wished concerning withdrawal of gas from storage. By entering into a contract with GW that did not permit it to withhold storage gas from GW, KN acted in a manner consistent with the tariff provision.

We conclude that nothing in KN's certificates or tariffs, or in the Commission's relevant orders, superseded or modified the unambiguous terms of KN's contract with GW.

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[13] Even had the tariff been considered by the Commission, the United States Supreme Court has held that "the existence of an actual shortage of gas forms the factual predicate necessary to the Commission's assertion of authority under its transportation jurisdiction, § 1(b) of the Act, 15 U.S.C. § 717(b), to approve the curtailment of gas already contracted for." *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976). In the first phase of Docket No. RP76-90, the Commission found that KN's tariffs contained a curtailment plan and should be judged by the criteria applicable to such plans. 58 F.P.C. 2890, 2898 (1977). KN never asserted that it suffered from a shortage of gas. KN's curtailment plan did not require that a shortage arise before the storage policy would go into effect. During both the first and second phases of the proceedings in Docket No. RP76-90, the ALJ found that KN was not suffering from a shortage of natural gas, and did not expect a shortage, if at all, for years to come. The necessary factual predicate for approval of a curtailment plan for gas already subject to contract was lacking in RP76-90.

II. EVIDENTIARY RULINGS

A. Exclusion of Certificates, Orders and Tariffs

At trial, the court excluded from evidence as irrelevant Commission orders concerning curtailment, the certificates of public convenience and necessity governing KN's storage and pipeline operations, and the 1975 and 1976 KN tariff sheets. Rulings on the relevancy of proffered evidence are within the sound discretion of the trial court and will not be disturbed on review absent an abuse of discretion. *People v. Lowe,* 660 P.2d 1261, 1264 (Colo. 1983); *Publix Cab Co. v. Colorado National Bank,* 139 Colo. 205, 232, 338 P.2d 702, 716 (1959). In addition, evidentiary rulings may constitute reversible error only when they affect a "substantial right" of the objecting party. C.R.E. 103(a).

KN argues that the proffered exhibits were relevant to the issue of damages and that their exclusion deprived it of a fair trial on damages. In support of its contention, KN again argues that the documents replaced the contractual standard for interruption with a binding governmental standard. This issue was resolved, however, when the trial court granted partial summary judgment in favor of GW on the issue of liability based on the contractual standard for interruption. Therefore, the only facts material to the determination of damages were whether interruptions had occurred, and whether such interruptions resulted from the application of an interruption standard that was in breach of the contractual standard. KN's exhibits, offered for the purpose of reinterpreting the contract, were not addressed to any of these material facts, and their exclusion was proper. C.R.E. 401.

B. Exclusion of Expert Testimony

KN also challenges the exclusion portions of its expert witness' testimony. KN called W.R. Chaney, a consulting engineer, to testify to his conclusion that a number of the

interruptions sustained by GW were caused by KN's physical inability to deliver gas and would have occurred even under the historical twenty-four to thirty-six hour analysis. In support of this conclusion, Chaney first discussed what he termed the "nominal throughput" analysis. Under his analysis, Chaney projected the amount of gas KN had available for delivery over the long term, and compared this amount to the natural gas requirements of all of KN's customers. The court excluded the testimony, ruling that physical inability to deliver gas could be demonstrated only by application of the short term twenty-four to thirty-six hour projections required by the contract. We agree with the court's ruling.

The contract contemplated application of a short term analysis to determine pipeline capacity each day. Conclusions based upon a long term analysis could not demonstrate that any interruption was not in breach of contract. The district court properly excluded the expert's conclusions as irrelevant.

Chaney then presented a number of short term analyses in an attempt to comply with the court's ruling. First, Chaney examined KN's daily records for the period in question to compare the amount of gas available in KN's production and storage fields against the amount of gas actually sold on a given day. Where more gas was available than was sold, Chaney hypothetically withdrew gas from storage in order to satisfy any interruptions that occurred on those days. Chaney estimated that as the amount of gas available from storage was depleted over time, there would have been sixty-one days in which KN would have been physically unable to serve its interruptible customers from storage. The court ruled the testimony inadmissible because Chaney's analysis did not distinguish among interruptible customers in determining whether gas would have been available to GW on any given day; this analysis was contrary to undisputed evidence that KN

interrupted its power plant customers before it interrupted GW.

Chaney then performed the same analysis again, this time including an assumption that the power plant customers were interrupted before GW was interrupted. Chaney concluded that there were fourteen days on which delivery to KN would have been physically impossible. GW counsel objected on the ground that the analysis was contrary to evidence that gas could have been injected into storage throughout the period, and that Chaney's assumption of storage depletion was incorrect. The court sustained the objection.

Chaney next attempted to apply a twenty-four to thirty-six hour analysis as required by the contract, but did so by assuming certain hypothetical weather conditions. The court ruled that this testimony was inadmissible because it was contrary to earlier testimony that dispatchers relied upon actual and not hypothetical weather conditions in applying the twenty-four to thirty-six hour analysis. Chaney then applied the twenty-four to thirty-six hour analysis on the basis of actual weather conditions; his testimony again was excluded on the ground that his analysis did not distinguish among classes of interruptible customers.

The district court rulings were correct. Although expert testimony need not be based upon facts admissible in evidence, the facts relied upon must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." C.R.E. 703. Facts that are contrary to the undisputed evidence cannot be reasonably relied upon by experts. *See High v. Industrial Commission,* 638 P.2d 818, 820 (Colo. App. 1981) (expert opinion based on facts contrary to the evidence "has no evidential efficacy"); *Merit Motors, Inc. v. Chrysler Corp.,* 569 F.2d 666, 673 (D.C. Cir. 1977) (stating in dicta that, under identical federal rule, expert testimony may not

be based upon unsupported assumptions); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1313, 1330 (E.D. Pa. 1980) (under identical federal rule, court may consider whether facts relied upon by expert are supported by the evidence). Expert opinions, whether or not based on evidence admitted at trial, are admissible only when they "will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." C.R.E. 702. An expert opinion based on facts contrary to the evidence cannot be helpful in understanding the evidence.[14] Here, the district court correctly predicated its evidentiary rulings on this principle.

Following these rulings, KN offered to prove through Chaney that delivery of gas to GW would have been physically impossible on certain days based upon a twenty-four to thirty-six hour projection, taking into account actual weather conditions and the actual priorities of interruption followed by KN. The trial court refused to receive the evidence because the facts underlying this "actual conditions" analysis had not been made available to GW in a timely fashion.

The record reveals a history of KN's incomplete and untimely compliance with discovery procedures. On September 28, 1978, GW submitted an interrogatory asking that KN identify its expected expert witnesses, the substance of their testimony, and the facts upon which their opinions would be based. On October 30, 1978, KN refused to answer the interrogatory because it was "premature." On April 27, 1979, KN supplemented its answer by identifying W.R. Chaney as an expert witness and stating that

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[14] The former rule in Colorado was that "an opinion by an expert cannot be based on facts not in evidence." *Liber v. Flor*, 160 Colo. 7, 16, 415 P.2d 332, 337 (1966). Under C.R.E. 703, the facts upon which an expert relies need no longer be admissible in evidence, but the rule of *Liber* retains its vitality to the extent that it forbids reliance upon facts contrary to the stated evidence.

Chaney was expected to testify to KN's physical inability to deliver gas under both hypothetical and actual weather conditions during the period in issue. The answer further stated that Chaney's opinion was to be based upon a review of KN's daily records. At his deposition on June 5-7, 1979, Chaney testified that he had begun working for KN in October 1978 and that he had selected his analysis in December 1978 or January 1979. He also set forth the conclusions he had reached under many of the analyses set forth above, but he made no mention of the final "actual conditions" analysis ultimately excluded at trial. At Chaney's deposition, KN counsel promised to supply GW with copies of all the work papers upon which Chaney had relied in reaching his conclusions.

On June 18, 1979, when the work papers still had not been provided, the district court ruled that KN had failed to fulfill its discovery obligations under C.R.C.P. 26 because KN had failed to name Chaney as an expert witness in its first interrogatory response, had failed to reveal his identity and analysis in a timely supplementary answer, and had failed when that supplementary answer was finally given to set forth the specific conclusions Chaney had reached and the specific facts he had relied upon. After KN's counsel once again promised to supply Chaney's work papers, the court set June 21 for a renewed deposition of Chaney. At the June 21 deposition, Chaney disclosed that he had performed an interruption analysis based upon the contract standard under actual conditions, but was unable to reveal the conclusions he drew from his "actual conditions" analysis. The conclusions, he stated, were in his work papers in Kansas City. These papers, along with many others, were given to GW for the first time in the days following the June 21 deposition, some arriving as late as July 2, the opening day of trial. On July 2, the court ruled that it would not receive any testimony based upon work papers received by GW after June 21, and, on this basis, excluded Chaney's "actual conditions" analysis.

The district court's imposition of the sanction excluding evidence was an appropriate exercise of its discretion. Under C.R.C.P. 26(b)(4)(A)(i), a party may discover through interrogatories the identity of all proposed expert witnesses, the subject matter upon which they will testify, the substance of the facts and opinions to be contained in their expected testimony, and a summary of the grounds for their opinions. KN's failure to identify Chaney as a possible expert witness in its first interrogatory response violated the rule. In addition, C.R.C.P. 26(e)(1)(B) requires that all responses to interrogatories concerning expert witnesses be seasonably supplemented. KN failed to identify any of Chaney's analyses until April 1979, months after he had been hired and his analysis chosen, and failed to identify at any point prior to Chaney's first deposition the exact conclusions and facts he relied upon in his analyses. KN's violation of the rule was compounded by its failure to identify Chaney's "actual conditions" analysis until June 21, and its accompanying failure to supply the relevant work papers until a few days before trial.

When Rule 26 is flouted, the trial court has the inherent discretion to levy appropriate sanctions. *Murphy v. Magnolia Electric Power Ass'n,* 639 F.2d 232, 234 (5th Cir. 1981); *Phil Crowley Steel Corp. v. Macomber, Inc.,* 601 F.2d 342, 344 (8th Cir. 1979); *Holiday Inns, Inc. v. Robertshaw Controls Co.,* 560 F.2d 856, 857 (7th Cir. 1977); *Dudley v. South Jersey Metal, Inc.,* 555 F.2d 96, 99 (3d Cir. 1977); *Davis v. Marathon Oil Co.,* 528 F.2d 395, 404 (6th Cir. 1975), *cert. denied* 429 U.S. 823 (1976); *Price v. Lake Sales Supply R.M., Inc.,* 510 F.2d 388, 395 (10th Cir. 1974); *Lewis v. Darce Towing, Inc.,* 94 F.R.D. 262, 25-66 (W.D. La. 1982); *Tabatchnick v. G.D. Searle and Co.,* 67 F.R.D. 49, 55 (D. N.J. 1975); *White v. Citizens National Bank of Boone,* 262 N.W.2d 812, 816 (Iowa 1978); *see also Wood v. Rowland,* 41 Colo. App. 498, 592 P.2d 1332 (1978) (court may levy sanctions for failure to disclose expert testimony in accordance with local court rules). In determining

whether sanctions were appropriate in the cited cases, the courts considered some or all of the following factors: the extent of prejudice to the opposing party from nondisclosure, whether the prejudice could be cured, the importance of the evidence to the nondisclosing party, whether the nondisclosing party had a valid excuse for failure to disclose in a timely fashion, whether nondisclosure violated an existing court order, and whether nondisclosure would adversely affect the trial process. *Id.* The courts are split over whether the bad faith of the nondisclosing party may be considered. *Compare, e.g., Dudley,* 555 F.2d at 99 *with White,* 262 N.W.2d at 816.

We need not decide whether bad faith should be considered in determining the appropriate sanction because application of all of the other factors overwhelmingly supports the exercise of the district court's discretion in imposing sanctions here. KN's failure to supply work papers until after the June 21 deposition prejudiced GW by depriving it of an opportunity to examine Chaney concerning the basis for his opinion prior to trial. Because the work papers were not received until just prior to trial, there was no opportunity for GW to cure the prejudice. Although the district court did not specifically order that the work papers be supplied, it ordered the June 21 deposition on the understanding that KN would supply the supporting documentation. Thus, KN's actions defied an understanding with the court, if not a direct order. KN presented no excuse for its failure to supply the papers over the many months it had to do so. Moreover, a failure to exclude evidence based upon the undisclosed work papers would have adversely affected the trial process by requiring a continuation to compensate for GW's missed preparation. Although the excluded evidence was undoubtedly of some importance to KN, the sanction of exclusion was well within the trial court's discretion in light of KN's repeated failure to respect the discovery process.

The judgment of the Court of Appeals is affirmed.

APPENDIX B

COLORADO COURT OF APPEALS, DIV. I.

Nos. 80CA0081, 80CA0236.

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Plaintiff-Appellee and Cross-Appellant,*

v.

NORTHERN NATURAL GAS CO., a Delaware corporation, *Defendant,*

KANSAS-NEBRASKA NATURAL GAS CO., INC., a Kansas corporation, *Defendant-Appellant and Cross-Appellee.*

June 17, 1982.

Rehearing Denied July 15, 1982.

Certiorari Granted March 21, 1983.

Gas customer brought action alleging breach of contract and fraud on part of natural gas pipeline company in connection with interruptions in service. The District Court, Logan County, Waino W. Johnson, J., entered judgment in favor of gas company, and both parties appealed. The Court of Appeals, Tursi, J., held that: (1) trial court did not err in declining to refer issues to Federal Energy Regulatory Commission under doctrine of primary jurisdiction; (2) evidence supported finding that gas company breached its contracts with customer; (3) customer was a direct, not an incidental beneficiary of service agreement between defendant gas company and another gas company, and obligation of former was to deliver gas to customer except when it lacked inadequate gas supply to do so; (4) tariff provision was filed uni-

laterally by gas company and accordingly could not relieve it of contract liability; (5) trial court did not abuse its discretion in excluding much testimony of gas company's expert; but (6) award of prejudgment interest at rate of ten percent was in error.

Affirmed in part, reversed in part, and remanded.

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Holmes & Starr, Hardin Holmes, Kenneth L. Starr, Jeffrey Reiman, George E. Clough, Denver, for plaintiff-appellee and cross-appellant.

Baker & Hostetler, Bruce D. Pringle, James A. Clark, Denver, Hershberger, Patterson, Jones & Roth, Richard Jones, William R. Smith, Wichita, Kan., for defendant-appellant and cross-appellee.

TURSI, Judge.

In this action for breach of contract and fraud, Great Western Sugar Company (GW) sought damages from Kansas-Nebraska Natural Gas Company (KN) and Peoples Division of Northern Natural Gas Company (Northern) in connection with interruptions in natural gas service occurring between November 1973 and March 1979 to GW's sugar beet processing plants in Ovid and Sterling, Colorado, in Scottsbluff, Nebraska, and in Goodland, Kansas. Jury verdicts totalling $1,000,000 were returned for GW against KN. Judgment was entered in the amount of the jury verdicts plus $350,229 in prejudgment interest. Northern was found not liable and that judgment has not been appealed. KN appeals the judgment against it, and GW cross-appeals as to the amount of damages awarded against KN. We affirm in part and reverse in part.

KN is a natural gas pipeline company operating an interstate pipeline system which serves Wyoming, Colorado, Nebraska, and Kansas. It is a jurisdictional pipeline subject to regulation by the Federal Energy Regulatory

Commission (FERC), formerly the Federal Power Commission (FPC). *See Public Service Co. v. Public Utilities Commission, Colo.*, 644 P.2d 933 (1982) (footnote 1). It is also subject to the jurisdiction of the Colorado Public Utilities Commission and the Kansas Corporation Commission.

GW operates thirteen factories which process sugar beets into sugar. For its factories at Ovid and Sterling, Colorado, and Scottsbluff, Nebraska, GW purchases natural gas directly from KN. For its factory in Goodland, Kansas, GW purchases gas from Northern which is supplied by KN pursuant to a service agreement. Natural gas is used by GW during its "campaigns" for space heating, beet pulp dryers, and boilers. The campaigns (the beet processing period from approximately November to January) coincide with KN's periods of peak demand for natural gas. Except for its space heating requirements which are furnished on a firm basis, GW purchases natural gas on an interruptible basis. For such interruptible service, GW pays a lower rate and maintains an alternate fuel capacity for periods when its gas service is interrupted to meet the demands of domestic and commercial users and other users having a higher priority of service. For interruptions which GW experienced between November 1, 1973, and March 1, 1979, it sought approximately $3.7 million. This represented the difference in price between natural gas under the contracts and the price of fuel oil which had to be used as a substitute fuel during periods of interruption.

GW's and KN's contracts for natural gas service date back to 1955 and were renewed periodically. The provision of the contracts dealing with interruption for the period in question is as follows:

> "It is specifically agreed as a condition precedent to provision of the rate herein and to the making of this agreement by KN that notwithstanding any other pro-

> vision of this agreement delivery of gas to [GW] shall be subject to interruption and that KN, irrespective of the happening of any of the occurrences herein before mentioned or referred to, but in its absolute discretion and without liability to [GW] for damages or otherwise, shall have the right to and at any time with or without notice may interrupt in whole or in part delivery of gas to [GW] hereunder as and whenever from time to time KN is required to do so in order to meet the demands of domestic and commercial users or other users having a higher priority of service.
>
> [GW] further represents and agrees that it will maintain standby fuel installations wherever necessary to avoid irreparable or serious loss or damage to person or property in event of interruption of gas supply."

Similarly, the service agreement between Northern and KN provided for interruptible service.

From 1955 until November 7, 1973, KN determined whether to interrupt GW by comparing its anticipated demand over the next 24 to 36 hours with its available supply of gas. If that projection indicated that there was sufficient natural gas available to meet the anticipated needs of KN's firm and interruptible customers, it would deliver gas to all customers. Otherwise, KN would begin stopping delivery to its interruptible customers. This is referred to as the "historical 24 to 36 hour analysis."

On November 7, 1973, KN stopped using the historical 24 to 36 hour analysis and adopted a new policy concerning the delivery of gas to interruptible customers. Under that policy, KN automatically discontinued deliveries of gas to all interruptible customers whenever it was withdrawing gas from its storage reservoirs. The new policy is referred to as the "storage withdrawal interruption policy."

GW contends that under the contracts KN was entitled to interrupt gas service to the sugar factories only when it lacked either the supply of gas or pipeline capacity to deliver gas to the factories, after first meeting the short term needs of residential and commercial customers, and that KN could only consider the availability of gas supply and pipeline capacity to serve those higher priority needs based on the historical 24 to 36 hour analysis. KN contends that the contracts did not limit its interruption decisions to the short term needs of residential and commercial users, and that orders of the FPC required it to husband gas in storage, if necessary, to meet future high priority demands.

Beginning in the late 1960's there was a national gas shortage. KN's gas reserves were being consumed at a rate faster than they were being replaced by new discoveries. In addition to declining gas reserves, gas pressure declined throughout KN's system because of the depletion of old wells and the reduction in pressure rate of flow, or deliverability. KN had begun utilizing underground storage reservoirs in 1964 to store gas at points on the system nearer the markets, where it could be utilized to maintain pressures in the pipeline. It became increasingly necessary to supplement deliverability from producing fields with deliverability from storage to maintain necessary pipeline pressure.

In response to the national gas shortage, the FPC promulgated various orders and statements of policy. Order No. 431, issued April 15, 1971, (18 C.F.R. § 2.70 (1981)) was a statement of general policy concerning supplies and capacity for the 1971-72 heating season. It encouraged pipeline companies subject to the FPC's jurisdiction to fill their storage fields to meet anticipated demands. It also required the pipelines to submit written reports to the FPC stating how they would implement the FPC policy of protecting dwindling gas supplies and

ensuring service for 1971-72. Any pipeline with a shortage was required to file new tariff sheets setting forth curtailment plans to effectuate the FPC policy. *See Atlanta Gas Light Co. v. FPC,* 476 F.2d 142 (5th Cir.1973).

Order No. 467-B, issued March 1, 1973, (18 C.F.R. § 2.78 (1981)) was another statement of general policy which prescribed "priority-of-service categories for use during periods of curtailed deliveries. . . ." Interruptible industrial requirements, such as GW's, were placed in the lowest categories. In that order, the Commission noted that it was acting because:

> "In situations where the need to curtail arises suddenly and without anticipation, and where no curtailment plan has been approved . . . the pipeline is placed in the difficult position of undertaking service cutbacks at the risk of civil liability to direct and indirect customers if the curtailments are not required by Commission order. . . . *See International Paper Co. v. FPC,* [476 F.2d 121 (5th Cir.1973)]."

Order No. 498, issued December 21, 1973, requested, *inter alia,* "all natural gas pipeline companies, where possible, [to] husband present supplies of natural gas for high priority usage" and required the filing of reports with the FPC on conservation measures that had been undertaken.

On August 29, 1975, KN filed tariff sheets with the FPC which contained the following limitation on service to industrial customers.

> "Seller shall not be required to remove gas from gas storage reservoirs for delivery to consumers served by Seller on an interruptible basis or under interruptible service rate schedules in this Tariff."

The tariff also limited the total volume required to be delivered to users in any calendar year.

A copy of these tariff provisions was mailed to GW on August 29, 1975.

These tariff provisions were suspended by the FPC for a statutory period of five months and were then permitted to become effective as of March 14, 1976, subject to refund pending final Commission approval. In December 1976, additional tariff sheets were filed establishing priorities of service, but retaining the aforementioned limitations. The lawfulness of these tariff provisions was the subject of a proceeding before the FERC designated as Docket No. RP76-90.

On June 25, 1976, GW filed its protest and intervened in RP76-90, claiming that the reductions in its gas service were unlawful because the tariff provisions constituted an abandonment under the Natural Gas Act 15 U.S.C. 717, et seq., (1976). GW specifically complained to the FPC about KN's practice of not serving it when withdrawing gas from storage. The FPC issued an order on June 30, 1977, holding that the tariff provisions should be considered a curtailment plan under Section 4 of the Natural Gas Act, and not an abandonment under Section 7. Under Section 4, the tariff provisions are permitted to become effective, subject to a later determination of their lawfulness.

While this appeal was pending, proceedings in RP76-90 were terminated pursuant to a stipulated settlement. In accepting the settlement, the FERC did not rule on the justness or reasonableness of the tariff sheets filed by KN, and accepted the tariffs as a suitable curtailment plan.

GW sued KN and Northern in January 1978 for breach of contract and fraud. Defendants asserted that the FERC

had primary jurisdiction to hear GW's claims and moved to refer the matters in dispute to the FERC for preliminary agency review. This motion was denied, as were subsequent motions to reconsider the issue.

GW moved for partial summary judgment against KN, asserting that KN's unilateral change in its delivery policy, which took effect on November 7, 1973, constituted a breach of KN's contracts with GW which provided service to GW's Ovid, Sterling, and Scottsbluff factories. KN also moved for summary judgment, asserting that certain FPC tariffs, certificates of public convenience and necessity, and orders immunized KN from contract liability. The trial court granted GW's motion, denied KN's motion, and ruled, as a matter of law, that the plain language of the applicable contracts did not allow KN to unilaterally withdraw any source of supply from GW's use. The trial court also determined, as a separate basis for declaring KN in breach of contract, that KN was obligated to employ the same method it had used for 18 years before November 1973 in determining when to interrupt.

GW filed a second motion for partial summary judgment, contending that it was a third-party beneficiary of the service agreement under which KN supplied gas to Northern for ultimate distribution to, among others, GW's Goodland, Kansas, factory and that KN's November 7, 1973 policy change constituted a breach of the service agreement. The trial court ruled that KN breached the service agreement by interrupting service pursuant to the November 7, 1973 policy change. The court also ruled that GW could, as a matter of law, be a third-party beneficiary of that agreement, subject to an ultimate jury determination of whether KN and Northern intended to confer benefits upon GW under the agreement.

During trial, the court directed a verdict for Northern on the fraud claim and submitted all remaining issues to

the jury. On July 12, 1979, on the breach of contract claim against KN, the jury awarded GW $775,000 for damages sustained at GW's Ovid, Sterling, and Scottsbluff factories. The jury specifically found that KN and Northern intended to confer benefits upon GW under the service agreement and on that contract claim against KN awarded GW $225,000 for damages sustained at the Goodland factory. The jury found for KN on the fraud claim and for Northern on the contract claim. The trial court then awarded prejudgment interest and costs to GW. KN's and GW's post-trial motions were denied and these appeals ensued.

KN argues on appeal that the trial court erred because of: (1) its failure to refer the matter to the FERC under the doctrine of primary jurisdiction, (2) its granting of partial summary judgment on the contract liability issue, (3) its exclusion of certain evidence, (4) its awarding prejudgment interest, and (5) its awarding expert witness fees to GW. GW claims that the court erred in denying its motion for a directed verdict.

I. PRIMARY JURISDICTION

We disagree with KN's contention that the trial court erred in declining to refer issues to the FERC under the doctrine of primary jurisdiction. KN has previously sought and been refused referral by the Colorado Supreme Court, U.S. District Court of Nebraska, and this court.

The doctrine of primary jurisdiction:

> "is a discretionary tool of the courts, a flexible concept to integrate the regulatory functions of agencies into the judicial decision making process by having agencies pass in the first instance on technical questions of fact uniquely within the agency's expertise and experience, or in cases whose referral is necessary to secure uniformity and consistency in the regu-

> lation of business, such as issues requiring the exercise of administrative discretion." *Columbia Gas Transmission Corp. v. Allied Chemical Corp.*, 652 F.2d 503 (5th Cir.1981).

See Nader v. Allegheny Airlines, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976); *Far East Conference v. U.S.*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952); *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir.1976). No fixed formula exists for deciding when to invoke the doctrine, *U.S. v. Western Pacific R.R. Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956), but courts should utilize it reluctantly where the application of the doctrine is inappropriate because of the nature of the action. *Mississippi Power & Light, supra.* Referral of issues to an agency is not required when the issue is strictly a legal one and the issues involved are within the conventional competence of the courts. *Nader, supra.*

The issues presented here involve common law contract claims. The fact that the Natural Gas Act and applicable tariffs affect some of the dealings between the parties does not oust state courts of jurisdiction over these common law claims. *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961); *Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561 (8th Cir.1962). State courts are competent to interpret tariffs as a question of law, *W.P. Brown & Sons Lumber Co. v. Louisville & Nashville R.R. Co.*, 299 U.S. 393, 57 S.Ct. 265, 81 L.Ed. 301 (1937), and the right to ultimate review by the U.S. Supreme Court facilitates uniformity of construction of tariffs. *Pan American v. Superior Court, supra.* Thus, preliminary resort to the FERC is not required merely because the applicability of a tariff is in dispute.

Although referral to an agency is particularly appropriate when the issues are subjects of pending proceed-

ings, *Mississippi Power & Light, supra,* this is no longer the case here, since proceedings in RP76-90 have been terminated.

Our balancing of the benefits of seeking prior agency assistance and the need to resolve this dispute fairly, but expeditiously, *Columbia Gas Transmission, supra,* leads us to the conclusion that the trial court did not err in refusing to refer issues to the FERC. Common law contract claims are the basis of this litigation, and these claims are within the conventional competence of state courts.

II. SUMMARY JUDGMENT

The trial court determined the principal liability issues by summary judgment. It ruled that KN breached its contracts with GW by improperly interrupting gas service to the Ovid, Sterling, and Scottsbluff factories, leaving only the issue of damages for the jury. The court also ruled that KN breached its contract with Northern and that GW could be a third-party beneficiary with regard to gas service to its Goodland factory, subject only to a factual determination by the jury as to whether the parties intended to benefit GW.

A. Breach of Contracts Between GW and KN

The trial court relied upon two grounds in ruling that KN breached its contracts with GW. The first ground was based upon the undisputed fact that GW, as an interruptible customer, did not receive any gas from KN storage facilities under the storage withdrawal interruption policy. We find this ruling consistent with *Kansas-Nebraska Natural Gas Co. v. Consumers Public Power District*, 179 Neb. 687, 140 N.W.2d 10 (1966) which held that, absent contract provisions to the contrary, all sources of supply must be made available to all customers of a gas supplier. We agree with this ruling.

The second ground for the granting of summary judgment was that the parties' course of dealing and course of performance included the historical 24 to 36 hour analysis for interruptions, and that the implementation of the storage withdrawal interruption policy breached the terms of the contract as established by the parties' course of conduct.

KN first argues that the trial court erred in examining the parties' historical behavior because the contracts at issue were not ambiguous and extrinsic evidence should not have been admitted. We disagree.

Evidence of course of dealing and course of performance is admissible if it does not directly contradict the terms of a written agreement, but merely explains or supplements it. *Budget Systems, Inc. v. Seifert Pontiac, Inc.*, 40 Colo.App. 406, 579 P.2d 87 (1978). It is the policy of the Uniform Commercial Code to consider previous course of dealing in determining the meaning of contract provisions. *Amerine National Corp. v. Denver Feed Co.*, 493 F.2d 1275 (10th Cir.1974); §§ 4-1-201(3), 4-1-205, 4-2-208, C.R.S.1973. And, "a course of performance is always relevant to determine the meaning of the agreement" because "[t]he parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was." Section 4-2-208, C.R.S.1973 (official comments 1 and 2).

The evidence relating to the parties' historical conduct under the contract explained how they interpreted the interruptible service provisions of their contracts. This evidence did not contradict any of the express terms of the contracts and was admissible in determining whether the contracts were breached. *Budget Systems, Inc., supra.*

KN argues that if course of dealing is to be considered, then the court should only have considered the parties'

course of performance after November 7, 1973—the date on which the storage withdrawal interruption policy was implemented. We disagree. The long history of the parties' conduct under the contracts is relevant, and the court properly considered it. *See Amerine National Corp., supra.* The parties had been dealing with each other since 1955. Although several contract revisions had been made over the years, these changes did not alter KN's use of the historical 24 to 36 hour analysis, which the trial court properly determined to be the contract standard.

KN next contends that the trial court erred in construing the contracts without giving effect to FPC Orders Nos. 431, 467-B, and 498. We agree that these orders were incorporated by reference into the contract, but find that their exclusion was not prejudicial to KN because none of the orders authorized KN's change in policy.

The interpretation of a written document is a question of law, and this court is not bound by the trial court's interpretation. *Budget Systems Inc., supra.* The following provision was contained in the contracts at issue:

> "This agreement . . . [is] subject to all valid and applicable laws and orders, rules and regulations of duly constituted authorities having jurisdiction or control over the parties, KN's facilities and gas supply, or any transaction contemplated hereby."

KN is a jurisdictional pipeline, subject to the orders of the FPC. *Mississippi Power and Light, supra.* Thus, we hold that the orders were incorporated in the contracts.

We have examined the orders, as summarized above, and do not find that they required a unilateral change in policy on the part of KN. The orders contain statements of general policy, requests to pipelines, and requirements for filing of plans and reports to the Commission. They do not excuse KN's breach of contract.

B. Breach of Service Agreement Between KN and Northern and GW's Third-Party Status

In 1966, GW constructed a new factory near Goodland, Kansas, and negotiated with KN for the purchase of gas for that factory. KN was not authorized to deliver gas in that area, but it told GW that it could do so indirectly through a service agreement with Northern. GW then entered into a contract with Northern for interruptible gas service, but it was KN which determined when service to interruptible customers should be shut off. GW's Goodland factory was treated in the same manner by KN as were the other three factories which were supplied gas directly by KN.

The trial court determined that GW was a direct, not an incidental beneficiary of the service agreement, and that KN's obligation was to deliver gas to Northern, except when it lacked an adequate gas supply to do so. It also ruled that KN could not unilaterally withdraw sources of supply from interruptible customers such as GW. However, the court ruled that a factual question remained as to whether KN and Northern intended to confer benefits upon a class of customers which included GW or GW itself. The jury found that KN and Northern had intended to confer benefits on GW.

KN argues that the trial court erred in granting summary judgment because the contract expressly states that KN was not required to furnish any volumes of gas in excess of firm demand. KN relies on that portion of the service agreement which states:

> "in no case is Seller to be required to furnish on any day a volume larger than the then existing Billing Demand plus (during the winter service period) the Winter Period Demand [total firm demand].

This provision, read alone, appears to grant KN total discretion in supplying gas for interruptible customers. However, another provision in the agreement states:

> "Seller also agrees to make deliveries of gas to Buyer in daily volumes in excess of [firm demand] on an interruptible basis when gas and facilities are available for making such deliveries."

Based on this second provision, the trial court correctly construed the service agreement, in light of the parties' course of performance, to mean that KN could not cut off gas supplies for interruptible customers, unless it lacked an adequate gas supply.

KN next contends that the court erred in determining GW could be a third-party beneficiary under the service agreement. It argues that, under the laws of Kansas, which it contends should be applied, GW could not have been a third-party beneficiary. We disagree.

We do not reach the conflicts of law issue, because under the laws of both Kansas and Colorado, the trial court properly determined that GW could be a third-party beneficiary of the service agreement.

In Colorado, "a person not a party to an express contract may bring an action on such contract if the patries to the agreement intended to benefit such person, provided that the benefit claimed is a direct and not merely an incidental benefit of the contract." *Fourth & Main Co. v. Joslin Dry Goods Co.*, Colo.App., 648 P.2d 178 (1982). The same proposition is true under Kansas law. *Martin v. Edwards*, 219 Kan. 466, 548 P.2d 779 (1976).

Kansas and Colorado law differ on how intent to benefit may be shown. In Kansas, the intent to benefit must be "clearly expressed in the contract" unless the contract is found to be ambiguous. Only if the contract is ambiguous can facts and circumstances surrounding its execution be

used as aids in clarifying the parties' intent. *Martin, supra.* However, "the name of the person to be benefited by the contract need not be given, if he is sufficiently described or designated. Indeed, he may be one of a class of persons, if the class is sufficiently described or designated." *Burton v. Larkin,* 36 Kan. 246, 13 P. 398 (1887), cited with approval in, *Martin, supra.*

Colorado law states that although "intent to benefit the non-party need not be expressly recited by the contract, the intent must be apparent from terms of the agreement as well as surrounding circumstances." *Fourth & Main, supra.*

The service agreement states:

> "WHEREAS, Seller is the owner of a system of pipelines and is engaged in the production, purchase, transportation and sale of natural gas; and
>
> "WHEREAS, Buyer owns and operates distribution and sale of natural gas in the Cities of Goodland and Kanorado, Kansas and for such operations desires a dependable supply of natural gas."

From the express terms of the service agreement, it is obvious that the parties entered into the agreement to benefit Northern's customers in Goodland, Kansas, by providing a dependable supply of natural gas. GW, as a customer in Goodland, was one of the class of persons who were intended beneficiaries of the service agreement. *Burton, supra; Fourth & Main, supra.*

The last error which KN assigns on the issue of the grant of summary judgment is that an issue of material fact existed as to whether KN notified GW of its policy to husband storage gas for high priority users. GW admits that there was an issue of fact as to notification, but contends that while the issue was relevant to their claim of fraudulent non-disclosure, it was immaterial to the breach of con-

tract claim. We agree with GW. KN was required to provide gas to GW from all of its sources of supply, *Kansas-Nebraska v. Consumers, supra,* and its notification to GW that it no longer intended to do so could not alter its contractual obligations. Thus, the trial court correctly concluded that there were no issues of material fact concerning KN's contract liability and properly entered summary judgment.

III. EXCLUSION OF EVIDENCE AT TRIAL

A. KN's Tariffs

KN contends that the trial court erroneously excluded from evidence as irrelevant, their tariffs filed with the FPC. The tariff provisions at issue provided that (1):

> "Seller shall not be required to remove gas from gas storage reservoirs for delivery to consumers served by Seller on an interruptible basis . . . ;"

2) customers receiving gas were subject to volume limitations not to exceed the volumes used in 1975 plus 50,000 MCF (thousand cubic feet); and 3) interruptible customers would be curtailed on the basis of priority categories. KN argues that these tariff provisions were incorporated by reference into the contracts pursuant to the previously quoted contract provision concerning incorporation of orders and regulations. Tariff provisions 1 and 2 outlined above were effective March 14, 1976, subject to possible refunds in the event the tariff was found unlawful by the FERC. 15 U.S.C. 717c(e) (1976). Provision 3 was effective July 1, 1977.

KN argues that the court's exclusion of the tariff resulted in its determination, as a matter of law, that KN breached its contracts when gas was being withdrawn from storage, when the tariffs, as part of the contract rights specifically permitted KN to interrupt for that purpose.

Our interpretation of the tariffs is that the provision at issue permitted KN discretion to enter into contracts limiting the sources of supply. However, the contracts, based upon the parties' prior actions, did not permit such a refusal to supply gas from storage or interruption of service unless KN lacked a sufficient supply of gas.

KN also contends that the exclusion of the tariff was error because it was precluded from introducing evidence of the maximum volume of gas to which GW was entitled under the contract. We disagree. This tariff provision was filed unilaterally by KN and, accordingly, cannot relieve it of contract liability. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956).

KN asserts that the exclusion of the tariff prevented it from showing that under the 1977 tariff provision, GW's dryers were supplied with gas withdrawn from storage after July 1977. Again, we disagree. The tariff would demonstrate why GW claimed less damages for the period but would not insulate KN from liability from all interruptions to the dryers after July 1977. KN's burden was to demonstrate that it did not have an adequate supply of gas on days when interruptions occurred. Its burden was not to show that it properly served the dryers during certain periods. *See* discussion of cross-appeal, *infra*. Thus, the trial court properly ruled that the tariff was irrelevant on the issue of damages.

B. KN's Expert Witness

The trial court excluded much of the testimony of KN's expert for various reasons. Some of the analyses were stricken because the court ruled that KN had breached its discovery obligations by not fully answering interrogatories propounded by GW concerning the expert witness

and had failed to timely provide GW with the expert's work papers. Other analyses were stricken because they were based on facts contrary to the evidence, and because the analyses were not based on the established contract standard which required use of the historical 24 to 36 hour forecast for determining interruptions.

Unless clearly erroneous, a trial court's ruling on the admissibility of expert testimony is conclusive. *Freeman v. Gentry Builders, Ltd.*, 185 Colo. 123, 522 P.2d 739 (1974). The trial court has broad discretion to determine the sanctions to be imposed on a party for failure to disclose the substance of testimony intended to be elicited from a witness. C.R.C.P. 16(d)(3). *Wood v. Rowland*, 41 Colo.App. 498, 592 P.2d 1332 (1978). *See* C.R.C.P. 26(b)(4)(A)(i). This is especially true in view of the continuing duty to disclose and supplement in a reasonable manner the substance of an expert witness' testimony. C.R.C.P. 26(e)(1). *See Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972). Furthermore, expert testimony may not be based on facts which are contrary to the evidence. *Liber v. Flor*, 160 Colo. 7, 415 P.2d 332 (1966).

With these principles in mind, we have reviewed the trial court's evidentiary rulings and do not find that the court abused its discretion, or that the rulings are clearly erroneous. Therefore, we find no error in the exclusion of parts of the expert's testimony.

Also, KN's reliance on *Crist v. Goody*, 31 Colo.App. 496, 507 P.2d 478 (1972) is misplaced. There, this court held that a trial court has discretion to exclude evidence which was not properly identified before trial, but if the evidence is admitted, then the granting of a motion for mistrial or continuance is obligatory. Here, the trial court properly excluded the evidence.

IV. PREJUDGMENT INTEREST

In view of our ruling on the cross-appeal in VI, *infra*, reversing the judgments insofar as they pertain to the money damages awarded and remanding the case for a new trial on the issue of damages, the award of prejudgment interest is also vacated. However, since the questions raised will come up again following the new trial, we will address them now.

The court found that KN had wrongfully withheld property, and therefore, GW was entitled to interest under § 5-12-102(1)(a), C.R.S.1973 (1981 Cum.Supp.). It further found:

> "That the gain or benefit to the Defendant, Kansas-Nebraska, by virtue of such withholding of property from the Plaintiff was at least the interest rate to pay for borrowed money during the period of time in question which was ten percent.
>
> "That the damage award of the jury must be prorated over the period that Plaintiff claims arose, being approximately six years, with interest compounded annually to the date of the judgment."

Accordingly, the court found that GW incurred damages of $166,666 in each of the first two years of damages and $166,667 in each of the four succeeding years, and awarded prejudgment interest in the amount of $350,229.

Contrary to KN's contention, we agree with the trial court's conclusion that § 5-12-102(1)(a), C.R.S.1973 (1981 Cum.Supp.) which became effective July 1, 1979, applies to any judgments in this case entered after that date. *Jasken v. Sheehy Construction Co.*, Colo.App., 642 P.2d 58 (1982). *Jasken* is dispositive of KN's contention that the amended statute is inapplicable because the withholding of the property was prior to the effective date of the amendment.

Pursuant to § 5-12-102(1), GW was entitled, at its election, to prejudgment interest at the rate of 8 percent per annum compounded quarterly, or "an amount which fully recognizes the gain or benefit realized" by KN.

The trial court awarded prejudgment interest at the rate of 10 percent. Its findings are inadequate for us to determine the basis upon which it determined the "gain or benefit realized" by KN in withholding the gas. Without these findings the award of interest at the rate of 10 percent was in error.

Furthermore, there was no factual basis for the courts proration of the jury award equally over the six year period in question. The statute provides that interest should run from the "date of wrongful withholding." The trial court's award made no findings in this regard and was therefore in error. On remand, the trial court should make the determinations outlined above prior to awarding prejudgment interest.

V. EXPERT WITNESS FEES

The last error that KN assigns is the trial court's award of $44,382.21 to GW's expert who did not testify at trial because of the exclusion of KN's expert's testimony. There is no error in the trial court's decision that GW was entitled to an award of costs for its expert, even though he did not testify. *Leadville Water Co. v. Parkville Water District,* 164 Colo. 362, 436 P.2d 659 (1967); § 13-33-103(4), C.R.S. 1973; 10 *C. Wright & A. Miller, Federal Practice & Procedure* § 2678 at 230 (1973).

However, the trial court's order made no findings as to the reasonableness of the fee that GW's expert charged. Thus, we are unable to determine whether the court abused its discretion in the determination of the amount awarded to GW. On remand, the court should, after a hearing if

necessary, make factual findings as to the reasonableness of the fee, and modify the award if appropriate.

VI. CROSS-APPEAL

As a method of proving its total damages, GW introduced evidence consisting of calculations which showed its increased costs for each of the approximately 250 days in which interruptions occurred. In its defense, KN presented what it admits was only "evidence of a general nature and not on a day-by-day basis." This pertained to its declining reserves and deliverability during the approximately six year period, its problems in trying to serve its firm and interruptible customers on peak days during the winter, and the severity of the 1978-79 winter.

At the conclusion of KN's case and again after all the parties had rested, GW moved the court to instruct the jury, in the nature of a directed verdict, that it was to award to GW damages on the contract claims for each and every day of interruption of service after KN put its storage withdrawal interruption policy into effect. The motion was grounded on KN's failure to present any evidence demonstrating its physical inability to deliver gas to GW on any of the days when interruptions occurred. The court denied the motion.

GW also tendered a jury instruction to the same effect, which the court refused. Instead, the court instructed the jury that KN had the evidentiary burden of showing "that its nonperformance was excused on any given day due to its physical inability to deliver gas to Great Western." The verdict forms submitted to the jury, without objection, provided a space only for the award of a total amount of damages, without itemization on a day by day or year by year basis. Following the jury verdict, for the reasons advanced in its motion for directed verdict, GW sought and was denied a judgment notwithstanding the verdict.

On cross-appeal, GW contends that the trial court erred in denying its motion for a directed verdict instructing the jury to award damages for each day that KN breached its contract and interrupted GW's gas service, without any reference to excuse for nonperformance. We agree.

A party who seeks to invoke an affirmative defense of excuse has the burden of proving its applicability. *Machebeuf v. Clements,* 2 Colo. 36 (1873), *aff'd,* 92 U.S. 418, 23 L.Ed. 504 (1876); *New Britain Machine Co. v. Yeo,* 358 F.2d 397 (6th Cir. 1966), *Detroit Edison Co. v. Main Island Creek Coal Co.,* 295 F. 781 (4th Cir.1924). *See Comfort Homes, Inc. v. Peterson,* 37 Colo.App. 516, 549 P.2d 1087 (1976).

Here, KN had knowledge uniquely within its possession as to the conditions which existed in its system for each day in which an interruption occurred. With this unique knowledge, as testified to by KN's chief dispatcher of gas, KN could have determined with precision which, if any, interruptions would have occurred, even under the historical 24 to 36 hour analysis. But, as found by the trial court and admitted by KN, KN failed to present any evidence to demonstrate that its nonperformance was excused on any given day.

The issue of the amount of damage incurred by GW resulting from each day's interruption remained a jury question. But on the evidence presented, even viewed in the light most favorable to KN, *Safeway Stores v. Langdon,* 187 Colo. 425, 532 P.2d 337 (1975), GW was entitled to the directed verdict it sought.

Lastly, in view of our ruling on the cross-appeal, we do not address GW's contention that the jury only awarded damages for the 1973-1974, 1974-1975, and 1975-1976 campaigns.

Accordingly, the damages portion of the judgment in favor of GW and against KN is reversed, and the cause is

remanded for a new trial on the issue of GW's damages incurred on each day that KN interrupted service to GW during the subject period. The award of prejudgment interest is vacated; the expert's fee is to be reviewed as directed in V *supra;* all other orders and the balance of the judgments are affirmed.

COYTE and VAN CISE, JJ., concur.

APPENDIX C

PROVISIONS OF NATURAL GAS ACT

(15 U.S.C. §§ 717 *et seq.*)

SEC. 4(b)

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. (15 U.S.C. § 717c(b))

SEC. 7(c)*

No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such

* This is the text of Section 7(c) as it existed prior to amendments made by Section 608 of the Natural Gas Policy Act of 1978.

certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. (15 U.S.C. § 717f(c))

APPENDIX D

REGULATIONS OF THE FEDERAL POWER COMMISSION AND FEDERAL ENERGY REGULATORY COMMISSION

Statements of General Policy and Interpretations of the Commission

18 C.F.R. § 2.70 *Measures for the protection of reliable and adequate natural gas service.*

(a) This Commission, charged with the responsibility for natural gas reliability, hereby promulgates as a statement of general policy that jurisdictional pipeline companies shall take all steps necessary for the protection of as reliable and adequate service as present supplies and capacities will permit during the 1971-72 heating season and thereafter, including adequate injection into storage in anticipation of the heating season.

(b) In order to effectuate the foregoing:

(1) During the storage injection season all natural gas pipelines subject to the jurisdiction of the Commission should make every reasonable effort to fill all storage fields supplied by such pipelines to a capacity sufficient to meet the anticipated heating season demands.

(2)(i) All jurisdictional pipelines will within 30 days hereof, submit a written report (four copies) to the Secretary of the Commission indicating how the instant statement of policy will be implemented. Pipelines responding that curtailment will be necessary will file a tariff sheet, pursuant to sections 4 and 5 of the Natural Gas Act and the Commission's regulations thereunder, setting forth a curtailment plan to effectuate the instant policy or state that the curtailment program, if any, currently on file will effectuate this policy. The curtailment plan proposed may be divided between the injection season and the heating

season, since different objectives may require different treatment.

(ii) Consideration should be given to the curtailment of volumes equivalent to all interruptible sales and to the curtailment of large boiler fuel sales where alternate fuels are available.

(3) The Commission, recognizing that additional short-term purchases of natural gas may be necessary to meet a pipeline's system demands for the immediate future, will continue the sixty (60) day emergency sales commenced under § 157.29 (18 CFR 157.29) pursuant to the certification provisions of this subsection. If a pipeline demonstrates continued emergency need, after complying with paragraphs (b)(1) and (2) of this section, the Commission will consider authorizing the pipeline to make gas purchases for a limited term at a rate above the national rate level prescribed in § 2.56(h) (18 CFR 2.56(h)) and will authorize abandonment of the sale at the time the certificate is issued if the same is demonstrated to be in the public interest: *Provided, however,* The certification authority set forth in this section shall apply to sales of natural gas from the offshore Federal domain only where the sales are made at the rate prescribed in § 2.56(h).

(4) Where emergency gas purchases are made and/or a curtailment program is instituted to implement the above policy the pipeline should place, or already have in effect, volumetric limitations on sales at current levels.

(5) Notice should be taken that the Commission will re-examine existing commodity rate levels and, to the extent necessary, may redesign existing commodity-demand rate relationships in present and future pipeline rate cases.

(6) Pipelines who can do so are encouraged to propose exchange arrangements with other pipelines.

(7) Jurisdictional pipelines have the responsibility in the first instance to adopt a curtailment program by filing appropriate tariffs. Such tariffs, if approved by the Commission, will control in all respects notwithstanding inconsistent provisions in sales contracts, jurisdictional and non-jurisdictional, entered into prior to the date of the approval of the tariff.

(c) Nothing stated herein should be construed as placing a limitation on measures to be taken by jurisdictional pipelines to effectuate the instant policy.

(Secs. 4, 5, 7, 8, 10, 16; 52 Stat. 83, 85; 15 U.S.C. 717c, 717d, 717f, 717g, 717i, 717*o*)
[Order 431, 36 FR 7505, Apr. 21, 1971, as amended by Opinion 699-B, 39 FR 33206, Sept. 16, 1974]

PART 154—RATE SCHEDULES AND TARIFFS

18 C.F.R. § 154.21 *Effective tariff.*

The effective tariff of a natural-gas company shall be the tariff filed pursuant to the requirements of this part, and permitted by the Commission to become effective. No natural-gas company shall directly or indirectly, demand, charge or collect any rate or charge for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or impose any classifications, practices, rules or regulations, different from those prescribed in its effective tariff and executed service agreements on file with the Commission, unless otherwise specifically provided by order of the Commission.

PART 157—APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

18 C.F.R. § 157.20(e)

The certificate issued to applicant is not transferable in any manner and shall be effective only so long as applicant continues the operations authorized by the order issuing such certificate and in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission.

APPENDIX E

Motion to Dismiss of Kansas-Nebraska Natural Gas Co , Inc.
(filed May 2, 1978; denied August 11, 1978)

COUNTY OF LOGAN
STATE OF COLORADO

Civil Action No. 13503

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Plaintiff*,

vs.

NORTHERN NATURAL GAS CO., A Delaware corporation, and KANSAS-NEBRASKA NATURAL GAS CO., INC., a Kansas corporation, *Defendants*.

MOTION TO DISMISS

Pursuant to Rule 12 of the Colorado Rules of Civil Procedure, Defendant, Kansas-Nebraska Natural Gas Co., Inc., moves the Court for an order dismissing Plaintiff's action because (a) such action constitutes an impermissible collateral attack on policies, orders, rules and regulations of the Federal Energy Regulatory Commission, (b), Plaintiff has not yet exhausted its administrative remedies, and (c) therefore, this Court lacks jurisdiction of the subject matter of this action.

A memorandum in support of this motion is being filed herewith and Defendant, Kansas-Nebraska Natural Gas Co., Inc., asks the privilege of presenting oral argument in support of the motion.

Respectfully submitted,

Arnold W. Baxter, Esquire
(Attorney Registration No. 001943)
ARNOLD & ROSS
Suite 201, H & B Building
118 Main Street
Sterling, Colorado 80751
Telephone: (303) 522-2341

Arthur R. Hauver, Esquire
(Attorney Registration No. 549)
JONES, MEIKLEJOHN, KEHL & LYONS
1600 Lincoln Center Building
1660 Lincoln Street
Denver, Colorado 80264
Telephone: (303) 861-4028

APPENDIX F

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF LOGAN
STATE OF COLORADO

Civil Action No. 13503

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Plaintiff*,

v.

NORTHERN NATURAL GAS CO., a Delaware corporation, and KANSAS-NEBRASKA NATURAL GAS CO., INC., a Kansas corporation, *Defendants*.

ORDER GRANTING THE MOTION FOR PARTIAL SUMMARY JUDGMENT OF PLAINTIFF AGAINST KANSAS-NEBRASKA AS TO LIABILITY AND DENYING KANSAS-NEBRASKA'S MOTION FOR SUMMARY JUDGMENT

Plaintiff The Great Western Sugar Company ("Great Western") has moved for the entry of partial summary judgment against Kansas-Nebraska Natural Gas Co., Inc. ("Kansas-Nebraska") on the grounds that there is no genuine issue of material fact as to an interpretation of the contracts at issue herein, that those contracts may be interpreted as a matter of law and that there is no dispute of material fact as to Kansas-Nebraska's breach thereof. Kansas-Nebraska has also moved for summary judgment, asserting as does Great Western that there are no genuine issues of material fact as to an interpretation of the governing contracts and that it has fully complied with those contracts. On the basis of the pleadings, excerpts of depositions, answers to interrogatories, exhibits, affidavits, and

other materials filed by the parties in support of their motions, the Court finds the following facts are undisputed:

In 1955, the parties entered into a contractual relationship under which Kansas-Nebraska was obligated to sell natural gas to Great Western for its plant at Ovid, Colorado. This contract and subsequent contracts entered into between Great Western and Kansas-Nebraska for the Ovid plant, as well as Great Western's plants at Sterling, Colorado and Scottsbluff, Nebraska, provided that Kansas-Nebraska's duty to perform its obligation to supply natural gas under the contracts would be excused under certain circumstances. The material provision for purposes of the pending motions is the "interruptible" provision of the various contracts. This original contract was drafted by Kansas-Nebraska, as were other contracts entered into thereafter from time to time by Great Western and Kansas-Nebraska.

For over eighteen years (from 1955 to 1973), Kansas-Nebraska operated under the "interruptible" provision by anticipating the system-wide demand for natural gas over a short time frame, described by Kansas-Nebraska's dispatching personnel as 24 to 36 hours. Kansas-Nebraska would then make a determination of whether it was physically able to supply the needs of all customers. If Kansas-Nebraska considered itself unable to meet these needs, it would "interrupt" or shut off service to certain customers to the extent necessary, in the appropriate order of priority. In making this determination throughout the 1955 through 1973 time period, Kansas-Nebraska made no distinction or separation amongst its sources of supply and the facilities which it would make available to its customers.

In approximately 1964, Kansas-Nebraska established its first storage field. From 1964 to 1973 Kansas-Nebraska from time to time furnished natural gas to Great Western at times when it was withdrawing gas from storage and

made no distinction between gas from storage and gas from other sources of supply or facilities in its practice under the interruptible provision. On November 7, 1973, Kansas-Nebraska's management instituted a new practice pursuant to which Kansas-Nebraska would determine when to interrupt service. Under this new practice, which totally changed the basis on which service was to be interrupted, Kansas-Nebraska no longer examined its anticipated system-wide demands over a short time frame, but rather interrupted service to Great Western and others whenever it was withdrawing natural gas from its storage facilities.

Based on these undisputed facts, the Court makes the following conclusions of law:

1. The language of the contract is plain and unambiguous. Under the contract language, Kansas-Nebraska is obligated to deliver gas to Great Western, but nonperformance is excused upon the occurrence of certain circumstances, which are described in the interruptible provision among others. Under the interruptible provision, Kansas-Nebraska may interrupt service whenever it is "required to do so in order to meet the demands of domestic and commercial users or other users having a higher priority of service" than Great Western. This language permits Kansas-Nebraska to anticipate the needs of its customers over a short time frame and to determine whether it can meet those short-term needs.

The contract does not enable Kansas-Nebraska to designate unilaterally which sources of supply and facilities it will make available to interruptible customers. There is no difference for purposes of this contract between a natural gas production field and a storage facility. While Kansas-Nebraska was under no duty to acquire new producing fields or storage facilities, once Kansas-Nebraska acquired those sources and facilities it was obligated to make them available.

2. The language of the contract is consistent with the parties' course of performance. For eighteen years, Kansas-Nebraska anticipated the system-wide demands of its users over a 24 to 36 hour period, and determined whether it was physically able to supply gas to accommodate those demands. Further, from 1964 to 1973 Kansas-Nebraska from time to time furnished natural gas to Great Western at ~~times~~ when it was withdrawing gas from storage and made no distinction between gas from storage and gas from other sources of supply or facilities in its practice under the interruptible provision. The contract language and the parties' course of performance are plainly harmonious.

On the basis of the foregoing undisputed facts and conclusions of law, the Court rules that Kansas-Nebraska breached its contracts with Great Western both by interrupting service to Great Western, without considering whether Kansas-Nebraska could physically supply the needs of its customers from all sources of supply and facilities on a short time frame basis as it had done for the first eighteen years of the parties' contractual relationship, and by interrupting service to Great Western at such times as Kansas-Nebraska was withdrawing natural gas from storage.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Partial Summary Judgment is hereby granted and that judgment of liability is hereby entered in behalf of the Plaintiff and against the Defendant Kansas-Nebraska Natural Gas Company, Inc., a Kansas corporation, upon Plaintiff's First Claim for Relief.

IT IS FURTHER ORDERED that the Motion for Summary Judgment for Defendant Kansas-Nebraska Natural Gas Company, Inc. is hereby denied.

IT IS FURTHER ORDERED that Defendant Kansas-Nebraska Natural Gas Company, Inc. shall have 20 days

from the date of this Order in which to file any post-hearing motions.

DONE IN OPEN COURT this 31st day of January, 1979.

BY THE COURT:

/s/ WAINO JOHNSON
District Judge

TRUE COPIES MAILED:

Mr. Kenneth Starr
Mr. Thomas Stifler
Mr. William Smith

January 31, 1979.

/s/ [Illegible]
Official Reporter

APPENDIX G

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF LOGAN
STATE OF COLORADO

Civil Action No. 13503

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Plaintiff*,

v.

NORTHERN NATURAL GAS Co., a Delaware corporation, and KANSAS-NEBRASKA NATURAL GAS Co., INC., a Kansas corporation, *Defendants*.

ORDER DENYING PLAINTIFF'S SECOND MOTION FOR ENTRY OF PARTIAL SUMMARY JUDGMENT AGAINST KANSAS-NEBRASKA

Plaintiff The Great Western Sugar Company ("Great Western") has moved for the entry of partial summary judgment against Kansas-Nebraska Natural Gas Co., Inc. ("Kansas-Nebraska") on the ground that there is no genuine issue of material fact as to Great Western's status as an intended third party beneficiary of the Service Agreement between Kansas-Nebraska and Northern Natural Gas Co. ("Northern"), Kansas-Nebraska's obligations under that Agreement and Kansas-Nebraska's breach of those obligations.

Great Western submits that Kansas-Nebraska and Northern entered into a Service Agreement concerning the wholesale supply of gas to the Goodland, Kansas area. The Service Agreement obligates Kansas-Nebraska to deliver natural gas to Northern "when gas facilities are available for making such deliveries." Great Western sub-

mits that this language unambiguously obligates Kansas-Nebraska to deliver natural gas to satisfy the demands of Northern's firm and interruptible customers except when Kansas-Nebraska is physically unable to do so. Great Western submits that Kansas-Nebraska's and Northern's course of performance under the Service Agreement reveals that, for many years prior to November 1973, Kansas-Nebraska delivered sufficient natural gas to satisfy the total demand of Northern's firm and interruptible customers at Goodland except when it was physically unable to do so. During this time Kansas-Nebraska drew upon all sources of supply and facilities in its effort to accommodate its customers' needs. Great Western submits that, at least since April 4, 1967, Kansas-Nebraska has determined when to interrupt service to the Goodland factory, with Northern deferring to Kansas-Nebraska's interruption decisions.

Great Western submits that Kansas-Nebraska's November 7, 1973 policy change, described previously in this Court's January 31, 1979 Order, impaired service to the Goodland, Kansas factory in the same manner that it impaired service to Great Western's Ovid, Sterling and Scottsbluff factories. Great Western submits that all interruptions at the Goodland, Kansas factory which result from this policy change constitute a breach of the Service Agreement.

Great Western submits that it is an intended third party beneficiary of the Service Agreement. Great Western submits that the Service Agreement was made for the benefit of the ultimate consumers in the cities of Goodland and Kanorado, Kansas, a class of customers which includes Great Western. Great Western submits that it is sufficiently designated in the Service Agreement so as to acquire a third party beneficiary status. Great Western submits that the benefit which it receives from Kansas-Nebraska's performance under the Service Agreement is direct and not incidental. Great Western submits that Kansas-Nebraska

and Northern, in entering into the Service Agreement and in negotiating with Great Western for the ultimate sale of gas to its Goodland, Kansas factory, intended to confer benefits upon Great Western or a class of customers which includes Great Western. Great Western submits that Kansas-Nebraska's active involvement during the Goodland negotiations and Northern's deference to Kansas-Nebraska's interruption decisions also lead to the conclusion that Great Western is a third party beneficiary.

The Court has reviewed the parties' briefs, exhibits attached thereto and authorities. In so doing, the Court concludes that Great Western has satisfied every contention outlined above, as a matter of undisputed fact, with one exception: did Northern and Kansas-Nebraska intend to confer benefits upon Great Western or a class of customers which includes Great Western. The parties' intention in this regard poses genuine issues of material fact for the jury.

IT IS THEREFORE ORDERED that Plaintiff's Second Motion for Entry of Partial Summary Judgment is denied, and that the jury will consider the sole issue of the parties' intent in this matter as outlined above.

DONE IN OPEN COURT this —— day of May, 1979.

BY THE COURT:

Waino Johnson
District Court Judge

APPENDIX H

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF LOGAN
STATE OF COLORADO

Civil Action No. 13503

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Plaintiff*,

v.

NORTHERN NATURAL GAS Co., a Delaware corporation, and KANSAS-NEBRASKA NATURAL GAS Co., INC., a Kansas corporation, *Defendants*.

MOTION TO REFER ISSUES TO THE FEDERAL ENERGY REGULATORY COMMISSION

Defendant, Kansas-Nebraska Natural Gas Co., Inc. (Kansas-Nebraska), moves that the following issues be referred to the Federal Energy Regulatory Commission (FERC):

1. Does the FERC have jurisdiction under the Natural Gas Act over the natural gas service, gas supply and transmission capacity of Kansas-Nebraska?

2. Under FPC Orders Nos. 431, 467B and 498 and Opinion No. 643, was Kansas-Nebraska required to husband gas in storage for its high priority users whether or not such policy was translated into tariff provisions and filed with the FPC?

3. Was Kansas-Nebraska's decision in 1973 that it should not provide service to large interruptible boiler fuel customers during periods of withdrawal of gas from storage

reservoirs in accordance with FPC policies and orders and Kansas-Nebraska's contracts with Great Western?

4. Do the contracts between Kansas-Nebraska and Great Western, as interpreted by Great Western, result in an undue perference or advantage to Great Western under Section 4(b) of the Natural Gas Act?

5. Is Great Western's interpretation of the interruption provisions of the contracts between Kansas-Nebraska and Great Western inconsistent with the terms of the certificates of public convenience and necessity which authorize Kansas-Nebraska to provide service to Great Western?

6. Is Great Western's interpretation of the interruption provisions of the contracts between Kansas-Nebraska and Great Western inconsistent with the terms of the certificates of public convenience and necessity which authorize Kansas-Nebraska to operate its storage fields?

7. Would an award of damages by this court to Great Western constitute an undue preference or advantage in contravention of Section 4(b) of the Natural Gas Act?

8. Would an award of damages by this court to Great Western for interruptions in service beginning in November, 1973 adversely affect the FERC's ability to carry out its responsibilities under Sections 4, 5 and 7 of the Natural Gas Act?

9. Does the court's interpretation of the interruption provisions of the contracts between Kansas-Nebraska and Great Western adversely affect the FERC's ability to carry out its responsibilities under Sections 4, 5 and 7 of the Natural Gas Act?

10. Is Kansas-Nebraska immune from contractual liability for not serving its interruptible industrial customers

from storage by reason of its tariffs and FERC orders, rules and regulations?

A memorandum is submitted in support of this motion.

Oral argument is requested.

LARRY D. HALL
Kansas-Nebraska Natural
Gas Co., Inc.
P. O. Box 608
Hastings, Nebraska 68901

APPENDIX I

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF LOGAN
AND STATE OF COLORADO

Civil Action No. 13503

THE GREAT WESTERN SUGAR COMPANY,
Plaintiff,

vs.

NORTHERN NATURAL GAS CO., and
KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.,
Defendants.

ORDER RE: FEDERAL ENERGY REGULATORY COMMISSION

THIS MATTER coming on for hearing on May 30th, 1979, upon Defendant's, Kansas-Nebraska Natural Gas Co., Inc., motion that certain issues be referred to the Federal Energy Regulatory Commission and the Plaintiff being represented by Shank, Irwin, and Holmes and the Defendant, K-N, being represented by Hershberger, Patterson, Jones, and Roth, and the Federal Energy Regulatory Commission having submitted a brief Amicus Curiae, by Howard E. Shapiro, Solicitor, and Kristina Nygaard, Attorney, and the Court having considered the motion together with the briefs in support and opposition thereto and having taken the matter under advisement now finds that this case involves common law issues which involve relief for the Plaintiff since November 7, 1973, and that through this action the Plaintiff can recover such damages wherein the FERC could not award damages prior to the date on which the tariff request was made involving withdrawal of storage

gas for interruptible contracts and that this Court in its discretion does not feel that the parties should be subjected to the delay which would be created by reference of any particular issues to the Federal Energy Regulatory Commission, and that the motion should be denied.

IT IS THEREFORE ORDERED that Defendant's, Kansas Nebraska Natural Gas Company, motion to refer issues to the Federal Energy Regulatory Commission is hereby denied.

DONE IN OPEN COURT this 8th day of June, 1979.

BY THE COURT:

/s/ WAINO JOHNSON
Waino Johnson

TRUE COPIES MAILED:

Mr. Jeffery Reiman, Esq.
Mr. Thomas Stifler, Esq.
Mr. William Smith, Esq.

/s/ J.L.R. AVEY
Official Reporter

APPENDIX J

IN THE SUPREME COURT
OF THE STATE OF COLORADO

NO. 79SA269

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.,
a Kansas corporation,
Petitioner,

vs.

DISTRICT COURT, Thirteenth Judicial District,
State of Colorado,
Respondent.

PETITION FOR WRIT OF PROHIBITION

Kansas-Nebraska Natural Gas Company, Inc. (hereinafter Kansas-Nebraska) petitions this Court to issue a writ of prohibition to prevent the District Court of the Thirteenth Judicial District from proceeding with trial in a pending action entitled "The Great Western Sugar Company, a Delaware corporation, v. Northern Natural Gas Company, Inc., a Delaware corporation, and Kansas-Nebraska Natural Gas Company, Inc., a Kansas corporation," Civil Action No. 13503, because such trial requires determination of issues over which the District Court lacks jurisdiction.

As grounds for the requested writ, it is submitted that:

1. The Federal Energy Regulatory Commission (hereinafter the FERC or the Commission) rather than respondent has exclusive and primary jurisdiction over the principal issues in the pending case.

2. The actions of respondent violate the supremacy clause of the United States Constitution by interfering with the overriding authority of the United States pursuant to the Natural Gas Act, the rules, regulations, orders and certificates of public convenience and necessity issued by the FERC thereunder, and petitioner's tariffs on file with the Commission.

3. Respondent lacks jurisdiction because The Great Western Sugar Company (hereinafter Great Western) has not exhausted the administrative remedies which it was pursuing before the pending court action was filed, which Great Western continues to pursue, and petitioner faces substantial risk of being subjected to inconsistent orders or judgments and thus will suffer irreparable injury.

4. An award of damages by respondent would constitute an undue preference or advantage to Great Western, in violation of Section 4(b) of the Natural Gas Act [15 U.S.C. § 717(c)], and force petitioner to violate the Natural Gas Act.

STATEMENT OF FACTS

The facts which give rise to this petition are as follows:

1. Petitioner is a natural gas company, engaged in the transportation of natural gas in interstate commerce and subject to regulation by the Federal Energy Regulatory Commission, 15 U.S.C. § 717, *et seq.*

2. Since 1953, petitioner has entered into various contracts with Great Western for delivery of natural gas to Great Western's sugar factories at Ovid and Sterling, Colorado, and Scottsbluff, Nebraska, on an interruptible basis. (Exhibit A is a current example.) In connection with the delivery of gas to each of Great Western's factories, petitioner has been required by the Natural Gas Act to secure, and has secured, the issuance from the Commission

of a certificate of public convenience and necessity permitting the service contemplated under the contracts. Each of the contracts between petitioner and Great Western is required to be filed with the Commission before service is commenced pursuant to the certificate authorizing service. In addition, petitioner has filed with the Commission tariffs stating the conditions of service to Great Western, as well as to petitioner's other customers, both firm and interruptible. Such tariffs have been from time to time accepted and approved by the Commission. To the extent that the certificates of convenience and the tariffs differ in terms and conditions of service from the contracts, the certificates and tariffs control. [*Home Bldg. & L. Assn. v. Blaisdell*, 290 U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231; *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (1971), cert. den., 404 U.S. 951, 1063 (1972)] Moreover, the contracts provide:

REGULATION

> This agreement and the respective rights and obligations of the parties hereto are subject to all valid and applicable laws and orders, rules and regulations of duly constituted authorities having jurisdiction or control over the parties, KN's facilities and gas supply, or any transaction contemplated hereby.

3. From the beginning of the relationship between petitioner and Great Western, the contracts have contained provisions for interruption of service to Great Western in language similar to the following (which is found in the March 1973 contracts for service to the Ovid and Sterling factories):

INTERRUPTION

> It is specifically agreed as a condition precedent to provision of the rate herein and to the making of this agreement by KN that notwithstanding any other provision of this agreement delivery of gas to Buyer shall

> be subject to interruption and that KN, irrespective of the happening of any of the occurrences hereinbefore mentioned or referred to, but in its absolute discretion and without liability to Buyer for damages or otherwise, shall have the right to and at any time with or without notice may interrupt in whole or in part delivery of gas to Buyer hereunder as and whenever from time to time KN is required to do so in order to meet the demands of domestic and commercial users or other users having a higher priority of service.
>
> Buyer further represents and agrees that it will maintain standby fuel installations wherever necessary to avoid irreparable or serious loss or damage to person or property in event of interruption of gas supply.

Notwithstanding the broad language of the interruption provisions of the contract, prior to November 1973 interruptions of gas service to Great Western's factories generally were for short periods of time only under conditions of mechanical failure or temporary shortage of supply or physical capacity.

4. In the early 1970's shortages of natural gas began to develop nationwide and on April 15, 1971, the Commission issued Order No. 431. Among the directives to interstate pipelines was the following:

> (7) Jurisdictional pipelines have the responsibility in the first instance to adopt a curtailment program by filing appropriate tariffs. Such tariffs, if approved by the Commission, will control in all respects notwithstanding inconsistent provisions in sales contracts, jurisdictional and non-jurisdictional, entered into prior to the date of the approval of the tariff.

On June 8, 1973, the Commission issued Order No. 467, and later No. 467-B, dealing with priorities of deliveries during periods of curtailment. Also during 1973 the Commission issued Opinion No. 643, 49 FPC 53 (1973), which

approved a husbanding plan, similar to that later adopted by petitioner, proposed by the Arkansas-Louisiana Gas Company, aimed at insuring firm winter service.

5. As a result of the aforementioned Commission orders and opinions, petitioner determined it could no longer legally serve large interruptible customers while withdrawing natural gas from or injecting natural gas into storage. Accordingly, from and after November 7, 1973, petitioner has followed the practice of not accommodating its interruptible customers with gas from storage in order to assure service to higher priority users.

Still later in 1973, the Commission issued Order No. 498 which reaffirmed its husbanding directives. These directives were implemented by petitioner by various actions, including discontinuance of service from storage to interruptible customers.

In August 1975, petitioner filed tariffs with the Commission containing, among other provisions, the following practice with respect to service from storage:

> Seller shall not be required to remove gas from storage reservoirs for delivery to consumers served by Seller on an interruptible basis or under interruptible service rate schedules in this Tariff. (FPC Gas Tariff, Third Revised Volume No. 1, Section 13b[4]).

This tariff was filed August 29, 1975, and became effective March 14, 1976. Revised tariff sheets were filed December 27, 1976, which contained essentially the same provision. The lawfulness of this tariff has been challenged by Great Western before the Commission in the curtailment proceeding FERC Docket No. RP76-90.

6. Docket No. RP76-90, entitled "Kansas-Nebraska Natural Gas Company, Inc." was initiated by the Federal Power Commission (predecessor to the FERC) on April 26, 1976. The proceedings are currently pending before a

Presiding Administrative Law Judge, who has filed two initial decisions. Great Western has intervened in the proceedings, has been participating actively therein, and has sought affirmative relief from the Commission.

The subject of these proceedings is petitioner's program for the allocation of natural gas supplies and pipeline capacity among petitioner's customers. Among the issues before the Commission are the following:

(a) The factual basis under which petitioner adopted its program of curtailment, e.g.:

(1) Storage withdrawal practices;

(2) Storage injection practices;

(3) Priority of service categories;

(4) Adequacies of petitioner's gas supply; and

(5) Pipeline capacity.

(b) The lawfulness of petitioner's current effective tariff provisions.

(c) If the tariff is deemed to be unlawful in whole or in part, the relief due affected customers of petitioner in the form of money damages or payback of gas.

Inherent in the foregoing is whether or not petitioner is immune from contractual liability and whether or not FPC Orders numbered 431, 467, 467-B and 498, Opinion No. 643 and petitioner's certificates of public convenience and necessity permit service to interruptible boiler fuel customers, such as Great Western, from storage.

7. On May 11, 1977, the Presiding Administrative Law Judge issued an initial decision. On June 30, 1977, the Commission modified that decision and rejected Great Western's contention that petitioner had violated its certificates of public convenience and necessity authorizing serv-

ice to reat Western. On March 13, 1979, the Presiding
Admi trative Law Judge issued his Phase II decision,
where he found that petitioner's tariffs were unlawful
only t he extent that they permitted increased service to
new o xisting customers at the expense of other existing
custon s. Upon the filing of exceptions to his decision, the
matte vill be presented to the Commission for a final
opinio In addition, the Presiding Administrative Law
Judge is not issued an initial decision in this proceeding
with r pect to the justness and reasonableness of the pri-
ority service categories contained within the tariffs.

8. I January 1978, Great Western initiated a suit
again petitioner and Northern Natural Gas Company,
Inc., i the District Court, Thirteenth Judicial District,
State Colorado, seeking to recover damages allegedly
incurr by reason of interruptions of service claimed to
be in each of the terms of the contract between itself
and tl defendants. A copy of that complaint is attached
as Ex bit B. The issues which must be resolved in Civil
Actio No. 13503 include all of the issues now pending
before ie Commission in Docket No. RP76-90.

9. S rtly after the commencement of the suit in the
Thirte th Judicial District, petitioner filed a motion to
dismi based on lack of jurisdiction of the court over
the p cipal issues in the case and requesting that fur-
ther ceedings be stayed pending a decision on those
issues the Commission. This motion was overruled on
Augu 11, 1978. Thereafter, while discovery was still in
progr . Great Western filed a motion for partial sum-
mary lgment on the issue of petitioner's liability. Peti-
tioner sponded to the motion by asserting that disputed
issues fact remained to be decided and again asserted
the su emacy of the existing federal regulation and the
exclus and primary jurisdiction of the Commission to
detern e the principal issues. On January 21, 1979, the
Distri Court granted Great Western's motion for partial

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summary judgment on common law grounds without regard or reference to the Natural Gas Act, and rules and regulations thereunder, or the certificates of convenience and necessity and the tariffs issued by and filed with the Commission. A copy of the District Court's order is attached as Exhibit C. A motion to reconsider filed by petitioner was denied by the court on March 26, 1979.

On April 23, 1979, petitioner filed in the District Court a motion renewing its challenge to the court's jurisdiction and petitioner's request that the issues be referred to the FERC for its consideration and decision. A memorandum was filed in support of that motion. A copy of that memorandum is attached as Exhibit D. In addition, the FERC through its solicitor filed a brief *amicus curiae* fully supporting petitioner's petition. A copy of that brief is attached as Exhibit E. By order dated June 8, 1979, and filed June 14, 1979, petitioner's motion was denied. A copy of the order denying said motion is attached as Exhibit F. Having exhausted its remedies in the District Court, petitioner files this petition for writ of prohibition.

10. As a natural gas company within the meaning of the Natural Gas Act, petitioner is and has been at all pertinent times subject to the rules, regulations and orders of the Commission in the exercise of its jurisdiction under the Natural Gas Act and specifically to the lawfulness of the terms and conditions of its service to its customers. The orders of the state district court and the present posture of this case threaten and will inevitably lead to violation of the Natural Gas Act in the following respects:

(a) Compliance with the orders of the district court respecting liability will result in an undue preference to Great Western over other customers of petitioner, in violation of Section 4(b) of the Natural Gas Act (15 U.S.C. §717(c).

(b) The actions of the trial court deny to the FERC the ability and jurisdiction to carry out its responsibility under Sections 4, 5 and 7 of the Natural Gas Act and threaten the whole federal scheme of regulation under that Act. (15 U.S.C. § 717, *et seq.*)

(c) The actions of the district court deny to petitioner the immunities and protections afforded it as a regulated utility under the Natural Gas Act.

(d) The orders of the FERC will be evaded and circumvented in violation of the Natural Gas Act and contrary to the spirit thereof.

(e) Petitioner will be subject to great cost and expense in further defending this action in a court which does not have jurisdiction of the issues involved and which, accordingly, can render no lawful judgments thereon.

The District Court of the Thirteenth Judicial District, State of Colorado, by denying petitioner's motions seeking reference to the FERC of issues and questions over which the Commission has exclusive and primary jurisdiction, and by declining to give any recognition to the supreme law of the land, is exceeding its jurisdiction for the reasons set forth herein and as more fully discussed in the memorandum supporting this petition. Unless stayed and prohibited the District Court will continue to improperly assert jurisdiction over the issues under consideration by the FERC.

WHEREFORE, petitioner prays that this Court:

(1) Issue an order staying the proceedings in the District Court during the consideration of the petition; and

(2) Issue a writ of prohibition to prevent the District Court, Thirteenth Judicial District, State of Colo-

rado, from exercising exclusive and primary jurisdiction over the issues involved in Civil Action No. 13503, "The Great Western Sugar Company v. Northern Natural Gas Company, Inc.

Respectfully submitted,

HERSHBERGER, PATTERSON, JONES & ROTH

By /s/ RICHARD JONES
Richard Jones
700 Farm Credit Banks Building
Wichita, Kansas 67202
316 - 263-7583

CLARK, MARTIN AND PRINGLE

By /s/ JAMES A. CLARK [1956]
James A. Clark
500 Capitol Life Center
Denver, Colorado 80203
303 - 839-1312

Attorneys for Petitioner

APPENDIX K

IN THE SUPREME COURT
OF THE STATE OF COLORADO

No. 79SA269

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.,
a Kansas corporation,
Petitioner,

v.

DISTRICT COURT, Thirteenth Judicial District,
State of Colorado,
Respondent.

ORIGINAL PROCEEDING

Upon consideration of the Petition for Writ of Prohibition filed in the above cause, together with the Brief in Support thereof and Respondent's Brief in Opposition thereto, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 21, 1979.

xc:

Richard Jones, Esq.
HERSHBERGER, PATTERSON, JONES
& ROTH
700 Farm Credit Banks Bldg.
Wichita, KA 67202

James A. Clark, Esq.
CLARK, MARTIN AND PRINGLE
500 Capitol Life Center
Denver, CO 80203

Hardin Holmes, Esq.
Kenneth L. Starr, Esq.
Jeffrey Reiman, Esq.
SHANK, IRWIN & HOLMES
717 Seventeenth Street, Suite 2440
Denver, CO 80202

T. N. Wright
A. R. Madigan
2223 Dodge Street
Omaha, NE 68102

Thomas C. Stifler, Esq.
GRESHAM, STIFLER GENTRY & COVELL
404 Mining Exchange Bldg.
P. O. Box 759
Colorado Springs, CO 80901

George E. Clough
P. O. Box 5308
Denver, CO 80217

Northern Natural Gas Co.
P. O. Box 338
25 Main Place
Council Bluffs, Iowa 51501

Charles W. Dreager, Esq.
KREAGER & DOWIS
229 Foote Building
Box 350
Sterling, CO 80751

[Supreme Court State of Colorado Certified to be a full, true and correct copy JUN 22 1979 DAVID W. BREZINA Clerk of the Supreme Court By /s/ JOAN M. RHYNE Deputy Clerk Court Seal]